

EXHIBIT C

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 22-10964-mg

4 - - - - - x

5 In the Matter of:

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7 CELSIUS NETWORK LLC,

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9 Debtor.

10 - - - - - x

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12 United States Bankruptcy Court

13 One Bowling Green

14 New York, NY 10004

15

16 February 6, 2023

17 1:59 PM

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21 B E F O R E :

22 HON MARTIN GLENN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: KS

1 HEARING re Hybrid Evidentiary Hearing Using Zoom for
2 Government RE: Debtors' Motion (a) establishing certain
3 dates and deadlines governing the briefing and resolution of
4 the legal issue against which Debtor entities account
5 holders have claims on account of cryptocurrency deposited
6 on the Debtors' platform. (Doc ##1338, 1382, 1552, 1592,
7 1619, 1631, 1729, 1747, 1795, 1796, 1797, 1798, 1799, 1953,
8 1955, 1960 to 1962, 1965, 1986 to 1991)

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25 Transcribed by: Sonya Ledanski Hyde

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1 ALSO PRESENT IN THE COURTROOM:

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4 CHRISTOPHER KOENIG

5 ELIZABETH JONES

6 GRACE BRIER

7 JAMES RYAN

8 JUDSON BROWN

9 LEAH HAMLIN

10 NIMA MALEK KHOSRAVI

11 ROSS KWASTENIET

12 TANZILA ZOMO

13 DANIELLE WALKER

14 ROBERT ORREN

15 TERENCE JOHN MCCARRICK

16 ANDREW LEBLANC

17 DENNIS DUNNE

18 ISHMAEL TAYLOR.KAMARA

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22 RHODELY VALLON

23 CLAIRE O'BRIEN

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6
7 ALSO PRESENT TELEPHONICALLY:
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1 P R O C E E D I N G S

2 THE COURT: Please be seated. All right, Mr.
3 Koenig?

4 MR. KOENIG: Good afternoon, Your Honor. Chris
5 Koenig with Kirkland & Ellis for the Celsius debtors.
6 Before we get to the main agenda today, which is the Series
7 B litigation, this isn't an omnibus hearing. We're not
8 going to provide a significant case update. We'll do that
9 at our next omnibus hearing on the 15th.

10 The Debtors did file just a few minutes before the
11 hearing began a notice of a recent phishing attempt. We
12 have filed these before. Just want to bring it to everybody
13 who is listening's attention. You know, it's a very serious
14 and concerning matter.

15 Whoever is engaging in this phishing attempt has
16 we believe used PDF editing software to take one of the
17 court orders that was entered in this case, the taxes order,
18 and modify it to falsely suggest that the Court ordered that
19 accountholders pay a fee, a court fee and a taxes fee. And
20 then they list a cryptocurrency address.

21 This is a scam, a hoax. Obviously with the number
22 of accountholders we have, it's going to be impossible for
23 us to reach all of them. We're trying to do so. We've
24 alerted the Committee, the U.S. Trustee, we alerted chambers
25 just before the hearing. We're going to continue to look

1 into it, and we want to continue to look into it with the
2 other parties. But we just wanted to -- we know a lot of
3 folks listen to these hearings, and so we wanted to make
4 sure that everybody was aware of this hoax. And please, if
5 you become aware of any other phishing attempts, please make
6 the Debtors aware or the Committee aware. We will file a
7 notice and bring it to everyone's attention.

8 THE COURT: Thank you very much, Mr. Koenig.

9 In light of the fact that they appear to have
10 taken an order of the Court and used it in part, we will
11 also report it to the U.S. Marshall. Ordinarily they
12 wouldn't get involved, the U.S. Marshall wouldn't be
13 involved. But since they seem to be trying to invoke
14 something that the Court did, we'll make sure we call it to
15 their attention promptly as well. It obviously has been a
16 repeat serious problem. Please, as you have, call it to our
17 attention as soon as you become aware of any such efforts.
18 Okay?

19 MR. KOENIG: Thank you, Your Honor. To the extent
20 we become aware of any additional information, we will of
21 course pass it along to chambers so that it can go along to
22 the U.S. Marshalls as well as everybody investigates.

23 THE COURT: Thank you very much.

24 MR. KOENIG: The parties have discussed -- turning
25 to the main event, the parties have discussed, and I believe

1 we have now resolved any outstanding objections to exhibits
2 for purposes of today's hearing. So absent objection, I
3 would move the exhibits on the Debtor's witness and exhibit
4 list into evidence. Maybe we should just get that out of
5 the way at the start of the hearing if that works.

6 THE COURT: Let me make sure -- as you can see,
7 I've got a lot of paper sitting here. Do you have an extra
8 copy of that exhibit list? That would be very helpful to
9 me.

10 MR. KOENIG: We do not.

11 THE COURT: Because I have to find it among this -
12 - I didn't try to sort that out before I came on the bench.
13 Oh, is it in the -- these are all numbered binders. Is it
14 in one of the numbered binders?

15 MR. KOENIG: Your Honor, I have another one of
16 those binders.

17 THE COURT: What I don't need is another set of
18 binders.

19 MR. KOENIG: I have a copy of just the exhibit
20 list if that's helpful.

21 THE COURT: That would be good. Actually, you
22 have ten exhibits. Is that it?

23 MR. KOENIG: Pardon?

24 THE COURT: You have ten exhibits on your exhibit
25 list?

1 MR. KOENIG: That's correct. And it was filed at
2 Docket Number 1986, Your Honor.

3 THE COURT: Actually, I do have that.

4 MR. KOENIG: Okay. I'll cede the lectern to
5 whoever else -- you know, so that the other parties can
6 enter their exhibits as well.

7 MR. LEBLANC: Your Honor, Andrew LeBlanc of
8 Milbank on behalf of the Preferred B holders. Your Honor,
9 we have no objection to the admission of the Debtor's
10 exhibits 1 through 10.

11 THE COURT: All right. So to make it clear then,
12 the Debtor's exhibits 1 through 10 are admitted into
13 evidence.

14 (Debtor's Exhibits 1 through 10 admitted into
15 evidence)

16 MR. LEBLANC: And, Your Honor, again, Andrew
17 LeBlanc of Milbank on behalf of the Series B Preferred
18 Holders. We are offering from our exhibit list -- and, Your
19 Honor, I have a copy of it if you would like it.

20 THE COURT: I think I have -- that one was right
21 in front of me. Thirty-four exhibits?

22 MR. LEBLANC: Thirty-four, although the last three
23 are placeholders, Your Honor. So it's really through 31.

24 THE COURT: Okay.

25 MR. LEBLANC: And, Your Honor, we are offering --

1 to resolve the objections that were noted to the Court, we
2 have agreed not to offer Exhibit 2, Exhibit 3, and Exhibit
3 7. So, Your Honor, we are offering Exhibit 1, 4 through 6,
4 and 8 through 31 for admission.

5 THE COURT: All right.

6 MR. LEBLANC: And we understand that with those
7 withdrawals, there isn't an objection, but I'll let the
8 other parties speak for themselves. Thank you, Your Honor.

9 THE COURT: Mr. Hershey, I take it -- just the
10 point -- does the Committee and the Debtors agree that the
11 noteholders' exhibits with the exception of 2, 3, and 7, can
12 be admitted into evidence?

13 MR. HERSHEY: Good afternoon, Your Honor. Sam
14 Hershey from the Committee. Yes, we do agree with that. I
15 just want to know, and we've discussed with the other
16 parties, we have an argument in our brief that exhibits are
17 relevant because they are the unexpressed intent of a
18 contract party. But that I think probably goes to weight
19 and not to exclusion. So as long as we reserve that
20 argument, we have no objection.

21 THE COURT: Mr. Koenig, you have no objection.

22 MR. KOENIG: For the record, Chris Koenig. We
23 have no objection to the Preferred --

24 THE COURT: So the Series B Noteholder Exhibits 1
25 through 30 with the exceptions of 2, 3, and 7, are admitted

1 into evidence.

2 MR. LEBLANC: Thank you, Your Honor. Andrew
3 Leblanc again. 1 through 31

4 THE COURT: 1 through 31, okay. Sorry, 1 through
5 31 with the exceptions of 2, 3, and 7 are admitted into
6 evidence.

7 (Series B Noteholder Exhibits 1, 4 through 6, and
8 8 through 31 admitted into evidence)

9 THE COURT: Okay, Mr. Hershey, go ahead.

10 MR. HERSHEY: Thank you, Your Honor. Again, for
11 the record, Sam Hershey from White & Case on behalf of the
12 Unsecured Creditors' Committee.

13 Your Honor, we have 13 exhibits on our exhibit
14 list. We have received no objection, so we would like to
15 offer those exhibits into evidence at this time.

16 THE COURT: Let me see and make sure I have that -
17 -

18 MR. HERSHEY: And I have a copy of our list, Your
19 Honor.

20 THE COURT: I have actually 12 exhibits. Is that
21 --

22 MR. HERSHEY: I believe it's 13, Your Honor.

23 THE COURT: You'd better give me your list.
24 Because the binder that I just opened has -- lists 12
25 exhibits. Okay. Does everybody -- there's no objections as

1 to the Committee's exhibits 1 through 13?

2 MR. LEBLANC: Andrew LeBlanc, Your Honor. No
3 objection.

4 THE COURT: All right. So the Committee's Exhibit
5 1 through 13 are admitted into evidence as well. Okay, so
6 we've dealt with that.

7 (Creditors' Committee Exhibits 1 through 13
8 admitted into evidence)

9 THE COURT: Go ahead, Mr. LeBlanc.

10 MR. LEBLANC: Thank you, Your Honor. Andrew
11 LeBlanc from Milbank on behalf of the Preferred B holders.

12 Your Honor, we discussed and I think what the
13 parties have agreed is we will start on the Series B
14 Preferred side. I'm going to argue primarily from our side.
15 Mr. Mester is here on behalf of CDPQ, another preferred
16 equity investor, joined on our -- is in our brief as well
17 and may argue or may argue on reply. But I expect that
18 we'll carry the laboring oar on it. And then the Debtor's
19 and the Creditor's Committee will argue after us and then
20 they've agreed that we'll respond as one would normally do
21 in a motion like this.

22 Your Honor, the issue before the Court is the
23 question under a contract of who is liable. The starting
24 point for that question under any contract is you would look
25 to is there a provision of the contract that dictates --

1 THE COURT: Well, I am correct though that you're
2 not claiming that the noteholders' contract has any
3 provisions that either silo the obligations of CNL. This
4 dispute as I read a lot of -- all of the paper is about a
5 contract that you're not a party to, your clients are not a
6 party to.

7 MR. LEBLANC: That is correct, Your Honor. This
8 is a -- the question that the Court is seeking to resolve is
9 to resolve the question of the contract of the -- the terms
10 of use, under the terms of use which Celsius entities are
11 liable.

12 THE COURT: But just so -- to put a fine point on
13 this, you agree that there is nothing in the noteholders'
14 contracts with CNL that limits what liability CNL could
15 agree to undertake, agree to assume, correct?

16 MR. LEBLANC: That's correct, Your Honor. We are
17 not suggesting that.

18 THE COURT: Okay.

19 MR. LEBLANC: We are arguing about the
20 interpretation of the terms of use as they were presented to
21 customers. And in particular, really starting with Version
22 6 because the issues I think -- and all the parties
23 generally agree on this -- is from Version 6 through Version
24 7 and Version 8, the one that's applicable as of the
25 petition date, those versions are substantially unchanged

1 from one another.

2 THE COURT: If I'm understanding all of this
3 correctly, you argue that one word in the middle of Section
4 25 of Version 8 of the terms of use is what excludes
5 liability of CNL for customer claims. One word only in one
6 place, in the middle -- you know, in your brief, you include
7 like three or four lines of a very long Section 25, right?
8 And it's that one word that is the basis for your argument
9 that CNL does not have liability for customer claims.

10 MR. LEBLANC: Your Honor, that is the crux of the
11 argument. Let me -- and let me be clear why I say that's
12 the crux of the argument. Because I do think you have to
13 consider the context. Now, there's other language in
14 Section 25. It starts by --

15 THE COURT: Well, a lot of words in Section 25.

16 MR. LEBLANC: There's a lot of words.

17 THE COURT: Neither -- none of you put all of
18 Section 25 in your briefs.

19 MR. LEBLANC: We didn't, Your Honor --

20 THE COURT: When I went back and looked at all of
21 Section 25, here is this one word in the middle of this very
22 long paragraph.

23 MR. LEBLANC: Right. But that word is the word
24 "affiliate".

25 THE COURT: I understand.

1 MR. LEBLANC: And it's in the very sentence that
2 excludes -- that defines what parties are excluded from
3 having liability under the terms of use. The rest of that
4 section deals with -- the first two sentences, for example,
5 preclude parties from having punitive damages claims or
6 special damages claims. It's all about the limitations on
7 liabilities that Celsius would have to its customers.

8 THE COURT: Let me ask this other -- and I do want
9 to hear -- I think this is a tough issue. I don't have --
10 I'm not ruling from the bench, let me make it clear to
11 everybody.

12 If Mr. Machinsky committed fraud, which seems to
13 be quite strongly alleged in the examiner's report and
14 elsewhere, Section 25 would not limit liability of CNL for
15 fraud claims.

16 MR. LEBLANC: Your Honor, I believe it would --

17 THE COURT: Really? Where?

18 MR. LEBLANC: Under --

19 THE COURT: You didn't brief that.

20 MR. LEBLANC: We didn't, Your Honor. The question
21 is under the terms of use -- Your Honor is talking about a
22 claim that would be brought under -- not under the terms of
23 use.

24 THE COURT: No. I am saying -- you know, I've
25 heard from day one in this case about alleged misstatements

1 by Mr. Machinsky, among others, but mostly by Mr. Machinsky.
2 He was the head of CNL, right?

3 MR. LEBLANC: He was. He was the head of LLC and
4 --

5 THE COURT: Okay.

6 MR. LEBLANC: And of CNI, the parent entity, yes.

7 THE COURT: And if he committed fraud, if he was
8 chairman of CNL and he committed fraud, actionable fraud,
9 Section 24 of the Terms of Use would not limit or -- would
10 not limit the ability of customers to assert and recover
11 claims against CNL for fraud, correct?

12 MR. LEBLANC: If CNL committed fraud and was sued
13 for fraud, then I agree with you that Section 25 doesn't --
14 Section 25 is intended to limit the -- is intended to find
15 the contractual rights.

16 THE COURT: It couldn't. It couldn't limit --

17 MR. LEBLANC: Agreed.

18 THE COURT: -- CNL's liability for fraud. Your
19 argument is it limits their liability for breach of
20 contract, but not for fraud, negligent misrepresentation,
21 RICOH. I can't imagine all the claims that are going to get
22 asserted against Mr. Machinsky.

23 MR. LEBLANC: And I think it's important, Your
24 Honor, to separate Mr. Machinsky from CNL. And to be clear,
25 it's not -- and what I mean by that is those claims may be

1 assertable against Mr. Machinsky, but it doesn't mean that
2 they're assertable against the mining company, against GK8.
3 Because it's important to recognize the Debtor's argument
4 here is that each and every entity in the corporate
5 structure is liable to customers contractually.

6 THE COURT: Well, you don't -- do you have a claim
7 against Mining?

8 MR. LEBLANC: We do not, Your Honor. But to the
9 extent that Mining has value that doesn't owe that value to
10 customers that flows up the corporate chain, gets to CNL.
11 And if there's -- and if, as we assert and we believe is
12 clear, both the intent and the language of the contract is
13 that there is no customer claims at CNL, and that would
14 inure to the -- could inure to the benefit of the preferred
15 equity.

16 And let me be clear -- and I think it's an
17 important thing to say could. Because I'm sure the Twitter
18 space is already blowing up about the arguments we're
19 making. But to be clear, this is one of two very
20 significant issues. And I think everybody acknowledges
21 that. We believe that the right way to read this contract
22 is to conclude that contractually the only liability is to
23 LLC, the entity to which the obligations and the assets were
24 migrated.

25 THE COURT: I understand that's your argument. I

1 just wanted to be clear that you're not contending that CNL
2 would not be liable for fraud claims, assuming they're
3 asserted and proved.

4 MR. LEBLANC: That's certainly not part of this
5 argument, and we're not suggesting that, Your Honor. But we
6 may defend CNL from a fraud claim were it brought --

7 THE COURT: I'm sure you would try.

8 MR. LEBLANC: -- if the Debtors didn't, Your
9 Honor. But that's not the issue that's before the Court.
10 The brief legal issue is who has claims or which entities
11 are claims assertable against under the terms of use. And
12 we've all briefed it in the same way, looking at the
13 contractual claim.

14 THE COURT: I understand that. I just wanted to
15 make sure we -- that you're all in agreement that it's got
16 nothing to do with whether CNL is liable for tort claims.

17 MR. LEBLANC: We're not suggesting that, Your
18 Honor. And let me take it one step further. And this is
19 the point I was trying to make a moment ago, which is there
20 are two distinct issues. One is the question of whether
21 there are claims against CNL. There is also the issue of
22 the intercompany claims that Your Honor has already
23 acknowledged is not part of this proceeding. That issue,
24 the extent to which there is and the size of any
25 intercompany claim we all concede that has to be an issue

1 that is resolved. And so were Your Honor to agree with us -
2 - and I would submit consistent with all of the evidence in
3 the record, were you to agree with us that it was never the
4 intent to create customer claims at CNL, we're not
5 suggesting that that means there's not an intercompany
6 claim. That is an issue that is yet to be resolved and has
7 to be resolved.

8 THE COURT: Your Honor, I have to say, Mr.
9 LeBlanc, the -- a surprising thing to me, not the only
10 surprising thing, but a surprising thing to me is that the
11 preferred holders' deal was not structured in such a way as
12 to silo off or cabin the potential liability or exposure of
13 CNL because I can -- it -- I can remember seeing plenty of
14 deals before I came on the bench where that was done. And
15 I've seen litigation opinions where that was the key issue
16 where -- did you -- and I guess the answer is no evidence
17 has been offered by anybody to suggest that the preferred
18 holders sought an agreement from CNL that it would neither
19 guarantee nor incur any additional liability,
20 indemnification of subsidiaries or affiliates. That's not
21 in your agreement.

22 MR. LEBLANC: Your Honor, I can't speak to for
23 future whether there are covenants in there about the
24 future. There was no covenant with respect to what existed
25 at the time. I know that to be true.

1 THE COURT: It also would be true that if there
2 were a Version 9 of the terms of use and Version 9 took out
3 the one word, affiliate, your argument would go away.

4 MR. LEBLANC: If version --

5 THE COURT: You would have had no control over
6 Celsius, CNL issuing Version 9 and taking that one word out.
7 That would do away with your argument.

8 MR. LEBLANC: Your Honor, it would contractually.
9 But that would replace it with a series of other arguments.
10 And in particular -- and this is actually -- I think this
11 illustrates an important point, a critical, critical point.
12 I do not believe it to be disputed between the parties that
13 from Version 1, the initial creation of this company through
14 Version 5 that the only entity that was ever liable to
15 customers was the one entity that faced customers, which was
16 at that time CNL. So no other affiliate was liable to
17 customers under every version of --

18 THE COURT: Yeah, but if there had been any value,
19 it would flow up to CNL and it would all get sucked out at
20 CNL.

21 MR. LEBLANC: But, Your Honor, there are other
22 entities that provided services to customers that may have
23 had their own separate third-party creditors. That value
24 would not have inured to the benefit of customers. And it
25 was set up very deliberately this way. And the reason I say

1 it's not disputed is because the only argument that they
2 have as to why CNL and the -- and to be clear, it's not just
3 CNL. CNL is an easy target. But it's also GK8 and Mining.
4 And I don't think you can exclude --

5 THE COURT: GK8, whatever value is going to flow
6 up to CNL is going to be sitting there. And the question is
7 who gets it. Do you get it?

8 MR. LEBLANC: I'm not sure that's true, Your
9 Honor. Because if the customers have claims against GK8 and
10 you are an individual creditor of GK8 --

11 THE COURT: It's a free and clear sale. Their
12 claims carry over to the proceeds from the sale.

13 MR. LEBLANC: Mining. If that's sold, same issue
14 there. There are creditors of Mining. And --

15 THE COURT: I'm sure if anybody buys Mining,
16 they're going to want a free and clear sale order as well.
17 And then the issue is, Your Honor, the proceeds of the sale
18 will be subject to, you know, someone will have to figure
19 out whether they have claims against Mining.

20 MR. LEBLANC: And, Your Honor, certainly CNL. CNL
21 has its own creditors that are owed. Those creditors are
22 going to be diluted by these customer claims if Your Honor
23 were to find, as the Committee is suggesting and the Debtor
24 is suggesting, that the customers share equally with them.

25 THE COURT: They'll also be diluted by any fraud

1 claims or any other claims against CNL.

2 MR. LEBLANC: Right. And they will be diluted by
3 intercompany claims. But those at least -- those are the
4 claims that under the structure actually existed.

5 And, Your Honor, the reason I make the point about
6 the history here is I think that history is important
7 because the Debtors suggest that our suggestion that the
8 company would have structured itself in a way that only the
9 customer-facing entity was liable to customers, that that's
10 an absurd argument, that's exactly how this company operated
11 for its entire existence until the creation of Version 6.

12 And what happened in Version 6? And the evidence
13 on this is uncontroverted. The purpose of Version 6 was to
14 satisfy the U.K. regulator that CNL would no longer be the
15 customer-facing entity because it didn't want the UK --

16 THE COURT: Go ahead. No, finish your statement.

17 MR. LEBLANC: It didn't want the U.K. entity to be
18 -- it was forbidding the U.K. entity from being a retail
19 customer-facing entity.

20 THE COURT: What I didn't see in any of the briefs
21 was any evidence or argument that the U.K. regulators
22 insisted that CNL no longer have liability to customers.
23 They couldn't be the customer-facing entity. But the fact
24 that LLC became the customer-facing entity doesn't answer
25 the question whether CNL continued to have liability.

1 The other side of it -- and I'm sure you'll
2 address this -- the Committee and the Debtors argue that
3 there was no written novation. There is no -- I haven't
4 seen anything that said that yes they shifted the customer-
5 facing entity to LLC, but that doesn't -- I didn't see
6 anything that would say definitively yes, LLC assumed the
7 obligations to the customers. Fully understand that. But
8 what I didn't see is something that said, and CNL no longer
9 has liability to the customers. Any liability they would
10 have, there's been a novation.

11 MR. LEBLANC: Your Honor.

12 THE COURT: Go ahead.

13 MR. LEBLANC: I have responses to that. Let me
14 just respond to that directly and I'll try to get back to
15 the other point I was making.

16 There is a document, Your Honor, that we cite in
17 our papers --

18 THE COURT: The unsigned novation?

19 MR. LEBLANC: Your Honor, and that's one of the
20 documents we actually didn't admit. We -- that was what we
21 had prior to discovery in this case. What we got was what
22 became of that novation agreement. We got that in
23 discovery. That's in our exhibit list. Your Honor, I don't
24 know if you have -- we filed on the docket yesterday a slide
25 deck.

1 THE COURT: I have it right here.

2 MR. LEBLANC: I've got several copies here.

3 THE COURT: No, I have a copy. You already put a
4 copy here.

5 MR. LEBLANC: Okay, great. And, Your Honor, if
6 we've been -- if we could allow Jordan Paperny from our
7 office to screen share, we'll make sure that the people on
8 the Zoom can follow this.

9 THE COURT: Yes. Deanna.

10 CLERK: Yes. He is a co-host.

11 THE COURT: Okay.

12 MR. LEBLANC: And, Your Honor, to respond very
13 directly to your question, on Slide 12 of our deck, we
14 reference Exhibit 15 that's now been admitted Series B
15 Preferred Holders' Exhibit 15.

16 THE COURT: Sure.

17 MR. LEBLANC: That is what became of the novation
18 agreement. That is signed by Mr. Machinsky and Mr. Leon on
19 behalf of CNL and LLC respectively. That document expressly
20 says that they are assigning -- that LLC agrees to assume
21 the obligations and CNL is transferring the obligations and
22 the liabilities.

23 Now, we show on Slide 13 -- I'm sorry, Slide 12,
24 we show -- the recital is on the left side. But, Your
25 Honor, I think it's worth -- in light of the importance of

1 this issue, I'm happy to go to the document itself.

2 So, Your Honor, if you have -- do you have you
3 exhibit binders there? I apologize.

4 THE COURT: Don't apologize. It's okay.

5 MR. LEBLANC: The secured holders' exhibit binder.

6 THE COURT: Series B Preferred binder. Which
7 exhibit?

8 MR. LEBLANC: It is Exhibit 15, Your Honor.

9 THE COURT: Fifteen, okay.

10 MR. LEBLANC: Blissfully, this is a relatively
11 short --

12 THE COURT: I've got it. Okay. It starts out by
13 saying Exhibit F.

14 MR. LEBLANC: It does, Your Honor. This was -- it
15 was attached as Exhibit F to our lawyer's declaration.

16 Your Honor, this is the asset transfer agreement.
17 And you can see on Page 127 of 158 that this document is
18 signed by Mr. Machinsky on behalf of CNL and Mr. Leon on
19 behalf of LLC.

20 THE COURT: Yes.

21 MR. LEBLANC: This is the document, if you go back
22 to Article 1.1 at the beginning, it says, "Upon the terms
23 and subject of the conditions set forth in this agreement
24 and effective upon the execution hereof, transferee --" and
25 that's LLC, "-- shall accept and assume from transferor --"

1 that's CNL, "-- and transferor shall transfer and assign to
2 transferee the transferred assets and liabilities." And if
3 you look, Your Honor, at the back, the last page with
4 writing on it, which is docket Exhibit 128 -- at Docket Page
5 128, transferred assets and liabilities.

6 THE COURT: Wait, I'm not -- okay, 128. Okay.
7 Yes, I see it.

8 MR. LEBLANC: It's the page after the signature
9 page.

10 THE COURT: Okay.

11 MR. LEBLANC: Yes. So, Your Honor, this is -- and
12 if you look at the draft novation, this is identical to it.
13 This just is the signed version which we had been unaware of
14 until the Debtor's production to us.

15 THE COURT: Okay.

16 MR. LEBLANC: They transfer all obligations
17 related to or resulting from the consenting user's use of
18 the Celsius app. Then it goes on from there. And they
19 transfer the business relationship, but customer lists, all
20 of the transferor's rights and the balances. So this is the
21 document that evidences --

22 THE COURT: But my question to you is it's one
23 thing to transfer -- when you get somebody else who agrees
24 they're going to become liable to the customers -- okay --
25 and I understand why CNL insisted, and perfectly

1 appropriate, to say LLC, you're now agreeing you're liable
2 to all the customers. But where is the language that says
3 that it's a novation and relieves CNL of all liability?

4 MR. LEBLANC: Your Honor, that...

5 THE COURT: It's one thing to transfer -- you
6 know, to say somebody else is going to be on the hook and
7 may be even primarily liable. But what is it that absolves
8 CNL of the liability?

9 MR. LEBLANC: Your Honor, what absolves CNL of the
10 liability, the reason is the entry by all customers into the
11 new contractual relationship with LLC. And so the new
12 contract supersedes the prior contract.

13 THE COURT: I understand, again, you're putting
14 all of the weight of your argument on the word affiliate in
15 the middle of a long Section 25. But just to be clear,
16 there is nothing in Exhibit 15 that says that CNL is
17 absolved of liability to customers. It says you, LLC, are
18 assuming those obligations, but it doesn't say that we, CNL,
19 will no longer be liable for it. Am I correct?

20 MR. LEBLANC: Not -- Your Honor, Exhibit 15 is not
21 a document with the customer. So I agree with that. But I
22 think it's important just to take --

23 THE COURT: Whether it's a document with the
24 customers or not, as between CNL and LLC, they didn't enter
25 -- they didn't sign a document that says you, LLC, are

1 liable to the customers. We, CNL, are no longer liable. I
2 understand. You're absolutely right. There would have to
3 be something with the customers that acknowledged that. You
4 say that Version 6 through 8 in effect did that. But
5 there's nothing in the agreement between CNL and LLC that
6 says we are absolved of liability to customers.

7 MR. LEBLANC: Nothing in that agreement speaks to
8 the liability to -- I mean, it speaks clearly to the intent
9 of the parties who transferred the obligation, but it
10 doesn't -- that isn't designed to be a contract or a
11 communication to customers. The communications to customers
12 come in the form of the communications to customers --

13 THE COURT: But even as between -- you know, I
14 didn't read this whole thing. But, you know, I don't know
15 whether there are any indemnification provisions, I don't
16 know whether there's any other theory of common-law
17 indemnification that would allow LLC to say yeah, we are
18 liable to the customers, but that doesn't mean you're no
19 longer liable to them as well, secondarily liable or
20 otherwise.

21 MR. LEBLANC: Your Honor, this is the point that I
22 had held for a moment. And this began with Your Honor
23 asking the question what's to stop them from taking
24 affiliates out of Version 9.

25 THE COURT: Right.

1 MR. LEBLANC: The answer is an independent
2 fiduciary acting for CNL would never do that. No rational
3 company would assume liabilities that it doesn't have to
4 assume. And what happened in this circumstance was the
5 company was directed by the U.K. FCA to have no contractual
6 relationship with customers.

7 THE COURT: Where do I see that?

8 MR. LEBLANC: Your Honor, you see that in the
9 direction agreement.

10 THE COURT: Let me see the -- point it out to me.

11 MR. LEBLANC: Your Honor, if you look at --

12 THE COURT: That's what -- I didn't see -- I
13 understood that the financial regulator in the U.K. said you
14 can't be -- you are no longer going to be the customer-
15 facing entity. Somebody else is going to be liable. But
16 what I didn't -- what I want to see, it is important to me
17 if there's something where the regulator said and CNL can no
18 longer be liable to customers.

19 MR. LEBLANC: Your Honor, if you look at our
20 slide, Page 10, that will refer -- and we can do the same
21 thing if we want to look at the exhibit behind it.

22 THE COURT: Okay. Give me a second.

23 MR. LEBLANC: Yeah.

24 THE COURT: Okay, slide page 10.

25 MR. LEBLANC: And slide page 10, Your Honor, this

1 is the direction agreement that was entered into with the
2 U.K. regulator and the migration plan that's part of that
3 direction agreement. And we highlight at the very beginning
4 that Celsius -- this is what they're telling the regulators
5 that they're agreeing to do, and that is to notify all of
6 its existing customers of the migration of their customers'
7 contractual relationship to Celsius Networks LLC or UAB as
8 appropriate by the migration date.

9 THE COURT: And what is it that says, and CNL
10 shall no longer have any liability to customers?

11 MR. LEBLANC: Well, Your Honor, the --

12 THE COURT: No, just -- is there anything? Okay -
13 -

14 MR. LEBLANC: I'll try to answer it.

15 THE COURT: Go ahead.

16 MR. LEBLANC: And the answer is -- the answer to
17 that question is the change to the terms of use and the
18 notification to customers -- the notification to customers
19 that their contractual relationship is now with LLC and
20 their rights and obligations are being transferred to
21 customers. That's --

22 THE COURT: Let me ask you this. If they issued a
23 Version 9 and they took the word affiliate out, would it
24 violate the direction agreement with the FCL?

25 MR. LEBLANC: I believe it would, Your Honor.

1 THE COURT: Why?

2 MR. LEBLANC: Because the customers would have
3 liability -- would have a contractual relationship with CNL
4 and have claims against CNL. And I think that's exactly
5 what the U.K. regulator was concerned about, that they
6 didn't want --

7 THE COURT: Where does it say that? Is it -- you
8 have a piece of paper from the FCA that says you, CNL, can
9 no longer have liability to customers?

10 MR. LEBLANC: Your Honor, I think other than what
11 you're looking at, these -- and this -- it's important, Your
12 Honor. This is from Roni Cohen-Pavon, who is one of the
13 drafters of the terms of use. So he's telling the U.K.
14 regulator that we're migrating the customers' contractual
15 relationship from CNL to LLC. And then he drafts the terms
16 of use.

17 THE COURT: I understand that's what happened.
18 They made LLC the customer-facing entity. It assumed all
19 the obligations. But what I don't see, Mr. LeBlanc, is
20 where either the FCA or CNL with LLC said and we, CNL, will
21 no longer be liable to customers. Why would the FCA -- why
22 would the FCA want to make sure that CNL was absolved of
23 customer liability? I mean, I can understand that they
24 don't want CNL as the customer-facing entity, they want --
25 LLC was going to do it. But what is it -- is there a

1 written document from FCA? Is there a regulation that FCA
2 issued that prohibited CNL from having customer liability?

3 MR. LEBLANC: Your Honor, what we have with the
4 FCA is what we described, yes.

5 THE COURT: This is it. Okay. Go ahead.

6 MR. LEBLANC: There's also the migration --
7 there's a couple of documents in our exhibit list and in our
8 pleadings that we refer to. There are communications
9 between the FCA and Roni Cohen-Pavon.

10 THE COURT: And do any of those address the issue
11 of whether CNL would receive a novation of liability to
12 customers?

13 MR. LEBLANC: They don't, Your Honor. But this,
14 again, gets me back to the point. Prior to -- because I
15 think Your Honor is focused on CNL. And obviously we are
16 creditors there.

17 THE COURT: That's what we are here about.

18 MR. LEBLANC: Well, it is. But the Debtor's
19 argument -- their plain language argument is not limited to
20 CNL. It doesn't say that because CNL was obligated on
21 Versions 1 through 5 that they are continued to be obligated
22 on 6 through 8. It says that the changes that were made in
23 Version 6 that are carried through to Version 8 made every
24 entity liable. And without those changes, not every entity
25 would be liable because they have not asserted any basis for

1 every other entity to be liable. So that's what they're
2 hanging their hat on.

3 The problem with that is there is no rational
4 explanation, not a shred of evidence, not a document, not a
5 witness, no financial statement, no statement to the board
6 that says that as of Version 6, we are changing the way we
7 interact with our customers, that instead of one entity
8 being liable to customers within the entire Celsius family,
9 instead of one entity, now every entity is jointly and
10 severally liable to customers. They didn't tell customers
11 that.

12 THE COURT: Well, let me ask you this. When they
13 put forth Version 6 to customers and asked them to check a
14 box, did Version 6 highlight that if you -- when you agree -
15 - if you don't agree, you can't do business with us. When
16 you agree, CNL will be absolved of all liability and only
17 the -- the only party with liability to you as customers is
18 LLC?

19 MR. LEBLANC: I believe it did, Your Honor.

20 THE COURT: Where? I'd like to see that.

21 MR. LEBLANC: Yeah. So, Your Honor, Slide 6 of
22 our deck.

23 THE COURT: Okay.

24 MR. LEBLANC: And it may be too small there.

25 THE COURT: I can read it.

1 MR. LEBLANC: Okay. It's the middle box, Your
2 Honor. This is the check the box.

3 THE COURT: Sure.

4 MR. LEBLANC: And I'm focused on the third one.
5 "I acknowledge that under the TOU, the services will be
6 provided to me by Celsius Networks LLC and that Celsius
7 Networks Limited shall transfer to Celsius Network LLC my
8 data, account balances, and its rights and obligations to
9 me.

10 THE COURT: What that doesn't say -- it goes back
11 to this same point. LLC assumed the obligations, but it
12 doesn't say that CNL is absolved of any liability to you.

13 MR. LEBLANC: And, Your Honor, we disagree with
14 that, obviously. The reason for that is Celsius operated in
15 a world where it had one entity that was customer-facing,
16 and that one entity had liabilities to customers. And it
17 did that under Versions 1 through 5 with a limitation on
18 liability provision that is indistinguishable in relevant
19 part from the limitation on liabilities in Versions 6
20 through 8.

21 The Debtor's argument -- the limitation on
22 liability provision didn't change. The Debtor's argument is
23 that when they took the steps that were required --

24 THE COURT: Did it include the word affiliates?

25 MR. LEBLANC: It did include the word affiliates.

1 It excluded affiliates from liability.

2 THE COURT: Where do I find that?

3 MR. LEBLANC: The change to Version 6?

4 THE COURT: Where do I find Version 5 that said
5 affiliates aren't liable. I understand about officers,
6 directors, agents, et cetera. That's pretty common.

7 MR. LEBLANC: Just give me one second, Your Honor.
8 So it's in --

9 THE COURT: Fitting affiliates in that line, in
10 the middle of it, that seems odd to me.

11 MR. LEBLANC: It's in Exhibit 22, Your Honor.

12 THE COURT: Okay.

13 MR. LEBLANC: And the one issue is that Exhibit 22
14 has all of the terms of use.

15 THE COURT: Oh, this is not -- yeah.

16 MR. LEBLANC: So if you give me one second, I will
17 find --

18 THE COURT: Okay.

19 MR. LEBLANC: I will hope to find Version 4. I
20 have the pages to Version 5.

21 THE COURT: That's fine.

22 MR. LEBLANC: So a redline of 5 to 6, Your Honor,
23 I've been told starts at Page 318. So a redline shows the
24 changes from Version 5 to 6.

25 THE COURT: Is that in the binder?

1 MR. LEBLANC: That's in the binder. Page --

2 THE COURT: Which tab?

3 MR. LEBLANC: I'm sorry, all of this is in Tab 22.
4 There's 126 pages.

5 THE COURT: Okay. I've got nothing but a sheet
6 that says Docket Number 850.

7 MR. LEBLANC: We were told Your Honor didn't want
8 ones that were so voluminous.

9 THE COURT: That's fine. Just bear with me.

10 MR. KOENIG: Your Honor, if I may approach. I
11 have a copy.

12 THE COURT: You have a copy? Thanks, Mr. Koenig.

13 Okay, all right. Mr. Koenig has given me ECF
14 Docket 393 open to Page 318 of 1126.

15 And, Your Honor, I think if you go forward to Page
16 369 is where Section 25 --

17 THE COURT: Hold on. I'll flip to that. Okay. I
18 don't think so.

19 MR. LEBLANC: Your Honor, the copy I have may not
20 have it right. But, actually, Page 371 I think is -- yeah,
21 Page 371 has the section that begins with, "limiting the
22 generality of the foregoing".

23 THE COURT: Yes.

24 MR. LEBLANC: Okay.

25 THE COURT: It doesn't begin, it's the...

1 MR. LEBLANC: Right. It's in that paragraph.

2 THE COURT: Fifth line down. "Without limiting
3 the generality of the foregoing, in no event shall you have
4 any recourse, whether by setoff of otherwise, with respect
5 to our obligations to or against any assets of any person or
6 entity other than Celsius, including, without limitation,
7 any member, shareholder, affiliate, investor, employee. And
8 it goes on from there.

9 THE COURT: Right. And this is my point. And,
10 Your Honor, the argument that is made by the other side is
11 that what changed from Version 5 to Version 6 is not
12 anything relevant in this provision, but instead is in the
13 definition of Celsius. Because this -- and we want to look
14 at the very beginning, Your Honor. If you look back at 318,
15 this version did not define Celsius to include affiliates.

16 THE COURT: It just says --

17 MR. LEBLANC: It just says CNL.

18 THE COURT: NO, it starts out -- well, I -- okay.
19 I see that's crossed out.

20 MR. LEBLANC: This is the redline. So you have
21 Celsius Network Limited was what it originally said.

22 THE COURT: Correct.

23 MR. LEBLANC: And it said, we, our, Celsius.
24 That's how it was defined.

25 THE COURT: Yes. Okay.

1 MR. LEBLANC: And so there isn't -- my point, Your
2 Honor, is this, that under every prior iteration of the
3 terms of use --

4 THE COURT: That clearly it was there.

5 MR. LEBLANC: (indiscernible) it was there. And I
6 don't think, while it's not a stipulated fact, I don't know
7 that it is disputed that under every prior iteration of the
8 terms of use, affiliates were not in fact liable. And that
9 includes Celsius Lending, for example, which did business
10 with customers through lending relationships. That includes
11 Celsius Mining, which had become an entity prior to Version
12 5.

13 THE COURT: I actually was curious about that. So
14 if a customer had a -- you know, borrowed from Celsius
15 Lending and the customer accused Celsius Lending of a
16 breach, they wouldn't have had a claim against Celsius
17 Lending?

18 MR. LEBLANC: Your Honor, they may have had a
19 separate contractual relationship, a borrowing relationship
20 with them. But they would not have had a claim against
21 Celsius lending under the terms of use.

22 THE COURT: Okay.

23 MR. LEBLANC: Nor would they have had a claim
24 against Celsius mining, which existed at the time under the
25 terms of use.

1 THE COURT: Okay.

2 MR. LEBLANC: And the point is that the question
3 that we have never understood -- and the Debtors have
4 offered -- they control the drafters of these terms of use
5 who made the changes. They're their employees. They have
6 not come to testify in a way that's consistent with their
7 view to explain why when you went from Version 5 to Version
8 6 to effectuate the migration that was required by the FCA,
9 why when you did that did you change it, as they would
10 contend, to be liability by one entity to liability by all
11 entities? And so while it's joint and several liability
12 presumably because customers can only recover once on their
13 claims, but they incurred conservatively \$200 billion of
14 liabilities in one fell swoop without a single document
15 presented to any person that would ever suggest that. And
16 not a document that -- not a document that existed at the
17 time, not a document that came after. No reference. They
18 didn't talk to a board member to say that just to be clear,
19 this is what we're doing when we make this change.

20 The reason, Your Honor, is that was never the
21 intent. What was the intent? The intent was to --

22 THE COURT: You can't tell me what the intent is.
23 Nobody has offered proof of intent.

24 MR. LEBLANC: Your Honor, I think the extrinsic
25 evidence proves the intent --

1 THE COURT: What extrinsic evidence?

2 MR. LEBLANC: Your Honor, the --

3 THE COURT: Don't tell me what the intent was.

4 You can tell me what's on a piece of paper.

5 MR. LEBLANC: Your Honor, the intent is what the
6 conclusion is in our view. You look at the extrinsic
7 evidence --

8 THE COURT: You can argue what the document says.

9 MR. LEBLANC: Your Honor, that's what I'm doing.
10 So, for example -- and we've talked about some of these, but
11 there are others.

12 Every document leading up to it reflects the
13 intent to migrate the customer relationship from CNL to LLC.
14 This company operated in a world in which it only had the
15 customer-facing entity liable to customers. That's how it
16 operated. And what did it do? It dealt with those
17 relationships between the Celsius entities through
18 intercompany agreements.

19 So in other words, they had -- and there's
20 evidence in this record about that being the very structure
21 that they engaged in here, because there is an intercompany
22 agreement between CNL and LLC that comes into place at the
23 same time that they executed the asset transfer agreement.

24 So what they do is they transfer the assets and
25 liabilities, all obligations to customers are transferred to

1 LLC and then they enter into an intercompany agreement.

2 THE COURT: Where do I find that?

3 MR. LEBLANC: Your Honor, the intercompany
4 agreement, I believe it's -- I think it's Exhibit 16.

5 THE COURT: Your Exhibit 16?

6 MR. LEBLANC: Correct, Your Honor. Our Exhibit
7 16, Series B Preferred Holders' Exhibit 16 is the
8 intercompany agreement.

9 THE COURT: Yes. What paragraph should I look at?

10 MR. LEBLANC: Well, Your Honor, just -- this is an
11 intercreditor agreement that reflects that after they
12 transfer all of the assets, then LLC is going to send some
13 assets back to CNL for it to manage essentially, to operate.
14 It's a short agreement, but I'm not pointing to any
15 particular provision. But I'm just talking about the
16 structure.

17 So what was intended there was -- let me not say
18 what was intended. What the documents reveal is that upon
19 the migration of the customer relationship from CNL to LLC,
20 they moved the assets and obligations. They told the
21 customers that's what they were doing, they told each other
22 that's what they were doing. And then they moved assets
23 back to CNL to deploy in income-generating activities. CNL,
24 for example, it was no longer a retail customer-facing
25 entity, but it continued to engage in a -- to have a

1 deployment through an institutional loan portfolio, for
2 example, and it was involved in investing in its mining
3 operations.

4 So the intent was -- the documents reflect that
5 what the parties did, what CNL and LLC did is they migrate
6 the customer relationship and then they moved some assets
7 back with an intercompany relationship between them so the
8 customers who deposit their coins with LLC have a claim
9 against LLC. And LLC in turn, if it has passed asset up to
10 CNL, has a claim against CNL to get those coins to the
11 extent that they need them. That's the second part that I
12 mentioned at the beginning, which is the size of that
13 intercompany claim is something that has to be determined.

14 But, Your Honor, all of this I think leads to a
15 conclusion. And then the additional evidence that we have
16 that I think is critical is the Debtors did not believe, or
17 at least the Debtor's own actions do not reflect that they
18 believed there were claims against all entities, which you
19 cannot reconcile their position today with there just being
20 a claim against -- at CNL. It has to be against all
21 entities. That's their argument. That means it has to be a
22 claim against the mining entity as well.

23 And, Your Honor, the evidence shows that the
24 Debtors did not believe in real time that there was a claim
25 against the mining entity.

1 Your Honor, you've seen this before, but the
2 Mining S-1 agreement, we have a slide in this. Let's see,
3 Page 13, Your Honor.

4 THE COURT: Okay.

5 MR. LEBLANC: And this refers to Series B
6 Preferred Holders' Exhibit 8, which is the Mining S-1. This
7 is another document that's not in your binder, your chambers
8 --

9 THE COURT: I'm looking on the screen.

10 MR. LEBLANC: Okay. And the Mining entity had a
11 balance sheet that they submitted a financial statement to
12 the SEC in this S-1. In that, they do not reflect any
13 liability to customers, which is entirely inconsistent with
14 the Debtor's position.

15 Now, what the Debtors say -- and I think this is a
16 remarkable statement. The Debtors in their reply say that
17 if they'd actually gone forward with the IPO, they would
18 have then amended the terms of use to eliminate Mining from
19 liability. That's what they said. That is a remarkable
20 statement. Because what they're saying is we submitted to
21 the SEC in this S-1 a materially misleading financial
22 statement that did not reflect the financial condition of
23 the mining entity as it existed at that time. And in doing
24 so, they -- but said but had we ever gone through with the
25 IPO, we would have corrected.

1 Your Honor, I just don't think that's a credible
2 explanation. I think what is far more credible is that
3 until this case started and the Committee started arguing
4 that the terms of use create liability at every entity, the
5 Debtors internally didn't believe that to be the case. And
6 I say that because there's not a single document that is
7 consistent with that. Every document is inconsistent with
8 that. There aren't a ton of documents. There were not a
9 lot of standalone financial statements for these companies
10 prior to the bankruptcy. But this is one example of
11 something that was submitted to the SEC that is entirely
12 inconsistent with their current argument. You cannot
13 reconcile this with their argument.

14 Your Honor, I do want -- there is -- Your Honor
15 had asked -- just one other example, Your Honor, in Exhibit
16 12. So this is turning back to the question Your Honor had
17 asked about the communications with the regulators. Do you
18 have Exhibit 12 there, Your Honor?

19 THE COURT: I do.

20 MR. LEBLANC: Your Honor, these are communications
21 with the U.K. regulators. And if you look, Your Honor, at -
22 - if you look, Your Honor, at Page 6 and -- I'm sorry,
23 Internal Page 6, which is Page 100 of 158. I apologize.

24 THE COURT: Okay. No, that's fine.

25 MR. LEBLANC: And, Your Honor, you can see this at

1 the top is an email from Roni Pavon responding to somebody
2 at the FCA. And it says, "Please find our reference to
3 issues raised in your email below."

4 And at the bottom, in number three, Mr. Pavon
5 says, "Upon withdrawal and completion of the migration plan,
6 Celsius Networks Limited will have three main activities.
7 One, it will have control of assets that are attributable to
8 the accounts of users that did not agree to be migrated to
9 Celsius' non-U.K. affiliates and will continue to have a
10 debt relationship with those users with respect to
11 (indiscernible) assets, i.e. the rump of customers that it
12 has not transferred."

13 I think, Your Honor, that's entirely consistent
14 with the position that we've taken that they did intend to
15 not have a liability relationship with the customers. There
16 is another reference that I think Your Honor makes the same
17 point. And this comes at Page 110 of this same document.
18 And page 110 is part of the migration plan that Celsius
19 provided to the U.K. regulator. So at Page 110. You can
20 see if you look at Page 106, that's where the migration plan
21 itself starts. And then this is the steps in the migration
22 plan.

23 And it says under Box A, "As noted above,
24 depending on the progress of the migration plan, additional
25 steps might need to be taken in connection with remaining

1 users. Until such time, the remaining users' contractual
2 relationship will continue to be with Celsius Networks
3 Limited, who will continue to hold the liability to
4 remaining users on its balance sheet.

5 So again, Your Honor, I think all the evidence in
6 the record is consistent with the position that we have
7 taken, that the company in fact migrated those obligations
8 to Celsius LLC, had intended to do so, believed it had done
9 so, communicated to customers that it did so.

10 THE COURT: But I -- the communication to the
11 customers is not all that clear, let's put it that way. I
12 mean -- let me leave it at that.

13 MR. LEBLANC: Well, Your Honor, I think if you're
14 a customer and you're told that --

15 THE COURT: You don't read an S-1, you don't read
16 this emails to -- back and forth with the FCA.

17 MR. LEBLANC: No. But you're told your rights and
18 obligations are now with -- we're -- you agreed that your
19 relationship is with the LLC and the rights and obligations
20 are -- I'm just looking at it again here -- that Celsius
21 Networks Limited shall transfer to Celsius Networks LLC my
22 data, account balance, and its rights and obligations to me.
23 That's what customers were told. So they lived in a world
24 up through Version 5 that they were told that they had no --
25 they only had a claim against CNL. They were told once

1 Version 6 comes into place and Version 7 and 8, your
2 relationship is entirely with CNL.

3 And again, we believe that that is the right way
4 to read the terms themselves just on their face. And to be
5 clear, Your Honor, I think the fact that -- it's not
6 surprising, and I wouldn't suggest for a second that it
7 would be unusual, but you don't need more than -- let me
8 take your example. If they took affiliates out of the next
9 iteration of the terms of use, if they had expressly
10 excluded CNL from liability, something they didn't do but
11 they could have done -- if they had expressly done that, it
12 would have been equally one word, and it would have -- I
13 don't think they would even be arguing that there's
14 liability.

15 And so the point is, Your Honor, the fact that
16 it's one word, it is one word in a provision that expressly
17 and specifically limits liability against the Celsius
18 entities. And which entities? The affiliates of Celsius.
19 Celsius is defined as LLC and its affiliates, but you take -
20 - you've added the affiliates in the definition. You take
21 them out in the exclusion. You are left with Celsius LLC,
22 meaning you're left in exactly the position that you were
23 that customers were previously and exactly the position this
24 company always was in, which is the customer-facing entity
25 is the entity that is exposed to customers and has liability

1 to them.

2 To hold otherwise, Your Honor, I think would fly
3 in the face of the extrinsic evidence. Because -- fly in
4 the face of the words on the page itself and the extrinsic
5 evidence. It also, Your Honor -- I don't know how you read
6 the rest of the provisions. Because affiliates are --
7 notwithstanding the fact that affiliates re included in the
8 definition of Celsius, the words affiliates of Celsius is
9 used throughout the document in various different places.
10 And we highlight this in our brief and we do have a slide on
11 this. We can look at it if Your Honor wants to. But I
12 think Your Honor is probably more familiar with the terms of
13 use than literally any person on the planet, so I won't
14 belabor the point. But I think it's critical.

15 The Debtors are asking you to give affiliates the
16 word in the middle of the exclusion, the limitation on
17 liabilities provision, they're asking you to give affiliates
18 a meaning that is different than the meaning that exists in
19 every other provision of the contract. That, Your Honor,
20 would violate fundamental principles of contractual
21 interpretation. They are also asking you -- to do that,
22 they're asking you to add words to that definition. Because
23 their argument today is what that means is affiliates who
24 are not part of our capital structure. Your Honor, you
25 cannot come up with that language. And in fact, it's a

1 tautology. Because affiliates are defined in a way to
2 include every entity that is under the even effective or
3 even indirect control.

4 And so we have a slide on this, Your Honor. Just
5 one second, Your Honor. If you go to -- our Slide 20, Your
6 Honor, illustrates this point.

7 THE COURT: Okay, I am there.

8 MR. LEBLANC: So, Your Honor, Slide 20, the
9 organizational chart that is here, this is the entire
10 corporate structure of Celsius. And the Debtors say that
11 every entity on this org. chart is liable to customers
12 because they are all affiliates. And they are liable simply
13 because the definition includes the word affiliate and
14 they're not excluded because they are excluded from the
15 affiliate. So, again, it's indistinguishable. They do not
16 limit themselves to CNL. And Your Honor I think should
17 avoid the inclination to do that.

18 THE COURT: Are you going to address the
19 Committee's argument that Section 13.3 -- how that section
20 applies?

21 MR. LEBLANC: Yes.

22 THE COURT: I mean, you argue that the specific
23 should displace the general. And I don't know if they
24 phrased it exactly this way, but the specific is 13.3 that
25 says (indiscernible) says bankruptcy.

1 MR. LEBLANC: Your Honor, that had us scratching
2 our heads enough that we actually put a slide in. It's the
3 next slide, Slide 21. The Debtors in their slide deck that
4 we saw that was served overnight as well, they have this
5 same section.

6 Your Honor, I think Your Honor dealt with this
7 very section extensively in connection with the earned
8 stable coin. Because what this section does as a whole it's
9 very clear is it makes -- it puts customers on notice that
10 in the event of a bankruptcy, you have no rights of
11 ownership. You don't have a constructive trust claim, you
12 have no indicia of ownership. At best you are a creditor.
13 Nothing in this section -- and we quote the provision, the
14 three in the hole.

15 THE COURT: Yeah, the sub three, 13.3. Right.

16 MR. LEBLANC: That doesn't create a creditor
17 claim. That doesn't say you are a customer. What it says
18 is --

19 THE COURT: So under applicable law. Is it
20 applicable non-bankruptcy law says your claim is only
21 against LLC, you've got a claim --

22 MR. LEBLANC: Correct. I mean, well, it says
23 that. But even before that it says -- it says you may not
24 have any legal remedies or rights in connection with
25 Celsius' obligations to you other than your rights as a

1 creditor of Celsius under applicable law. So it's actually
2 in an exclusion. The entire purpose of this provision --
3 remember, it's entitled Consent to Celsius' Use of Digital
4 Assets. The entire purpose of this provision 13 is to
5 ensure that customers could not come to a bankruptcy court
6 and say that those coins deposited are mine. And Your Honor
7 dealt with this. All it says is --

8 THE COURT: I'm still getting a lot of people who
9 are saying it's mine.

10 MR. LEBLANC: I understand, Your Honor. And Your
11 Honor refers to Section 13 repeatedly in your decision.
12 That's the purpose of Section 13. It doesn't create any
13 rights or obligations, whether pursuant to bankruptcy law or
14 otherwise. And it doesn't say you are a creditor of every
15 entity here. It says you have no rights other than as a
16 creditor under applicable law. So to the extent that you
17 have a claim, you have a claim as a creditor, not as a
18 secured creditor, not as a constructed trust, as a trust --
19 as a beneficiary of a trust or anything like that.

20 So, Your Honor, we believe that the question here
21 -- the only way to reconcile the arguments that have been
22 made, Your Honor, inconsistent. And the Debtors, frankly,
23 they don't even suggest that there's any extrinsic evidence
24 that is supportive of their position. They control the
25 witnesses, they control the documents. There is none.

1 THE COURT: Well, you control a lot of witnesses
2 and documents, too. I mean, you know, none of you get a
3 pass on this. You certainly don't. I mean, your clients --
4 I don't know who the negotiators were, but someone
5 negotiated the preferred agreements. This is the point I
6 made at the start. There's nothing where I would expect to
7 see something if the goal was to silo the assets and
8 liabilities of CNL to assure that the preferred don't have
9 all these billions of dollars of customer claims is to draft
10 language that prohibits CNL from guaranteeing or
11 indemnifying or what have you. That's the concept that I
12 usually see. I don't see that yere.

13 MR. LEBLANC: But, Your Honor, had that happened,
14 they would still be making the same argument. They would be
15 saying even though you tried not to do it -- and let's be
16 clear, White & Case represented my clients in diligence
17 making this investment. I think Your Honor is fully aware
18 of that. That was disclosed by them. But maybe the lawyers
19 that the company -- that our clients had diligence
20 (indiscernible). It wasn't Mr. Mester and myself.

21 But, Your Honor, it wouldn't change the fact that
22 when our clients made their investment, this migration had
23 already occurred.

24 THE COURT: But had been a Version 9 that said and
25 we agree that every entity is liable, you're out of luck.

1 MR. LEBLANC: We are, Your Honor. But that takes
2 me back. No rational operator or manager of Celsius
3 Networks Limited would just say I'm going to take on
4 billions of dollars of liability. No one would. And that's
5 the comfort that you get when you don't have a contractual
6 provision.

7 THE COURT: I've never seen a sophisticated lawyer
8 rely upon, oh, they'd be crazy to do that.

9 MR. LEBLANC: Your Honor, I think there are a lot
10 of people -- Mr. Machinsky was the manager of this company.
11 He was also the -- he stood to benefit greatly from equity
12 improvement in the company. And so it just doesn't make
13 sense that they would voluntarily take on enormous
14 liabilities that there was no reason for them to do so. And
15 we invested at a time when this is the state of play. And
16 again, maybe --

17 THE COURT: But usually the investors want to be
18 sure that this is documented, they can't do it.

19 MR. LEBLANC: Well, Your Honor, I think our
20 clients were investing in a company that had a lot of assets
21 beyond this customer-facing business, in particular the
22 mining operation. And our investment was used to buy GK8.
23 And so we certainly believe we have recourse there.

24 So, Your Honor, we think the terms of use are
25 clear and the evidence is consistent with it. Thank you,

1 Your Honor.

2 THE COURT: Thank you, Mr. LeBlanc.

3 MR. KOENIG: Good afternoon, Your Honor. Again,
4 Chris Koenig, Kirkland & Ellis, for the Debtors. I'm going
5 to start -- there was a lot of colloquy with Ms. LeBlanc, so
6 I'm going to probably start with some of the questions you
7 posed to him, and then I'll turn back to our affirmative
8 argument.

9 What I'll start with is where you started with,
10 which is there may be other -- this is just one issue for
11 today, which is what are the terms of use say. There may be
12 other claims. There may be claims for fraud, as Your Honor
13 pointed out, there may be an intercompany claim, as Mr.
14 LeBlanc was discussing. There may be other claims arising
15 out of the examiner's report as well. I know that
16 substantive consolidation is an extreme remedy and
17 disfavored, but there are certainly facts in the examiner's
18 report that may make that at the appropriate time if we end
19 up there. That may be something that could be pursued.
20 Perhaps a constructive fraudulent transfer claim at the
21 appropriate time. Again, not for today.

22 THE COURT: It's usually not the debtor's lawyer
23 arguing that, but go ahead.

24 MR. KOENIG: Pardon? What I'll start with is
25 almost all of the colloquy that you had with Mr. LeBlanc

1 about extrinsic evidence only matters to the extent the
2 contract is ambiguous. And here, and what we've laid out in
3 our papers and in the presentation we filed last night is
4 the contract -- the terms of use are replete with references
5 to how Celsius owes obligations to the customers. Now, I'll
6 come back to that. But let me start with where you were
7 going with Mr. LeBlanc for a little bit. So let me start
8 with the assignment of various documents that you pointed
9 to. And again, this only matters to the extent the contract
10 is ambiguous.

11 It's an assignment, but not a novation. There was
12 a novation agreement. It was never signed.

13 THE COURT: Well, is the unsigned novation
14 agreement an exhibit?

15 MR. KOENIG: It's an exhibit. I don't believe it
16 was admitted into evidence.

17 THE COURT: Fine. All right.

18 MR. KOENIG: But the Series B have not pointed to
19 any novation document in existence. There was one of the
20 letters between regulators that Mr. LeBlanc was referring
21 to. That's not a contract with the customers, it wasn't in
22 any communications with the customers, and it wasn't part of
23 something that any of them signed. And just because there's
24 an assignment doesn't mean that there is an extinguishment
25 of liabilities on behalf of the transferor. And there's a

1 section of the terms of use that I think illustrates this
2 well. If you look at Paragraph 32 or Section 32 of the
3 terms of use --

4 THE COURT: Where do I find that?

5 MR. KOENIG: Section 8. The version I have
6 doesn't have the numbers on the top.

7 THE COURT: Is it in what you handed me?

8 MR. KOENIG: That's Version 6, Your Honor.

9 THE COURT: Okay.

10 MR. KOENIG: Your Honor, this is a clean version.

11 THE COURT: Okay. Thank you, Mr. Koenig. You're
12 pointing to Paragraph 32?

13 MR. KOENIG: Thirty-two, the assignment provision.
14 So if you look -- it's actually -- I believe it's on the
15 next page of what I...

16 THE COURT: Okay. It starts on one page
17 (indiscernible) 31 and carries over to the next page.

18 MR. KOENIG: Carried over to the next page. And
19 that's the page that the first number is 33.

20 THE COURT: Yes.

21 MR. KOENIG: So it says, "Celsius may assign or
22 transfer these terms or any or all of its rights and/or
23 obligations here under at any time to any third party by
24 providing prior notice." But it doesn't say anything about
25 if the transfer occurs that Celsius will no longer be

1 liable. I mean, if this provision were to mean that, I
2 could create a new entity, Koenig LLC, and have Celsius
3 transfer all of its obligations to the customer to an empty
4 shell that has no assets that can't possibly be able to --
5 what it means. There has to be a novation that has to
6 extinguish the liability. It doesn't -- you know, none of
7 the documents that Mr. LeBlanc pointed to say that. The
8 terms of use --

9 THE COURT: You could do a Texas two-step and not
10 provide the guarantee of all obligations.

11 MR. KOENIG: No comment on that, Your Honor. All
12 right. So a contractual -- I'm sorry. And this is the
13 argument that we make in our reply brief that starts at
14 Paragraph 24 that a transfer of obligations is different
15 than a novation and different from extinguishing liability.

16 Let me turn to the redline that I had handed you
17 earlier.

18 THE COURT: Let me ask you this. So Mr. LeBlanc's
19 claim to both the communications with the FCA and then in
20 the -- I guess in the check box, the three -- you know, you
21 check the third box, it obviously clearly -- it does not say
22 in those precise words that CNL will no longer have
23 liability, is absolved of liability, and it said basically
24 that LLC is obligated. Okay. Why isn't that enough?

25 MR. KOENIG: For purposes of Mr. LeBlanc?

1 THE COURT: Yes.

2 MR. KOENIG: Because it doesn't say that hereafter
3 CNL shall have no obligation to you. It says LLC will have
4 an obligation to you. And the terms of use themselves are
5 littered with obligations to Celsius. So starting with the
6 beginning of the document, it says that the document, the
7 terms of use is between accountholders and the defined term
8 Celsius, which is Celsius Network LLC and its affiliates.

9 Throughout the document there are references to --

10 THE COURT: So the scrivener's error was in
11 defining Celsius as Celsius and its affiliates? If they
12 wanted to limit against whom claims would lie, the error was
13 in that opening sentence that defines Celsius as Celsius and
14 its affiliates?

15 MR. KOENIG: Your Honor, I think if there is an
16 error, it is in Section 1, not Section 25. I don't think
17 it's a scrivener's error. And if you look at the redline
18 that I handed you --

19 THE COURT: Yes.

20 MR. KOENIG: I think Mr. LeBlanc actually has it a
21 little bit backwards. I think that there were other changes
22 to the terms of use that suggest that this result is exactly
23 what was intended.

24 So if you start in the first page of the --

25 THE COURT: Show me what was intended or what you

1 believe shows an intent for CNL to remain liable.

2 MR. KOENIG: Sure. So if you look at the first
3 page -- at the top it's Page 318 of 1126. I'm sorry, of the
4 redline that I handed you earlier, the spiral bound.

5 THE COURT: Okay. Tell me again which page.

6 MR. KOENIG: Sure. It's the first page, Page 318
7 of 1126.

8 THE COURT: Yes, okay. I'm there.

9 MR. KOENIG: So it says -- it used to say Celsius
10 Network Limited.

11 THE COURT: Right.

12 MR. KOENIG: And now it says Celsius Network LLC
13 and its affiliates. And the word collectively is added
14 there.

15 THE COURT: Yes.

16 MR. KOENIG: And before, I mean, Celsius Network
17 Limited is the top company in the structure. All of the
18 obligations flow up to it. It owned all of the assets at
19 that point in time. It made sense that there wouldn't be
20 affiliates at that point in time. But at the time when the
21 contractual relationship -- and it's important to note the
22 contractual -- or the customer-facing relationship is
23 different from liabilities. When it migrated down, it
24 became important to obligate all of the other entities --

25 THE COURT: So let me just -- just -- I think that

1 you agree with Mr. LeBlanc that it flows from your argument
2 that each and every one of the Celsius affiliates -- Mining,
3 GK8, which is now sold -- well, it hasn't closed yet -- GK8,
4 every one of them is liable for all customer claims.

5 MR. KOENIG: That is our position, that every
6 debtor entity is liable for all customer claims.

7 And if you turn, Your Honor, to Page 371 of 1126
8 in the same binder, this is Section 25.

9 THE COURT: I'm there. Yeah. I'm there.

10 MR. KOENIG: This is the limitation of liability
11 here.

12 THE COURT: Correct.

13 MR. KOENIG: So there's an important word that's
14 added here. It's the word shareholder.

15 THE COURT: Yeah, it's added. But what it struck
16 me as everything other than the word affiliate there would
17 be -- I've seen a dozen times. You know, before I was a
18 judge, since I was a judge. You know, everybody wants to
19 make clear that members, shareholders, investor, employee,
20 officer, director, agent, isn't vicariously liable just from
21 being in that position.

22 MR. KOENIG: Right. And the point is just this
23 provision, Your Honor, is to make sure the entities other
24 than Celsius are not liable. Now, what Mr. LeBlanc I think
25 is saying is there are two clauses in this sentence. The

1 first one says you don't have any recourse except with
2 respect to Celsius. And then it says, you know,
3 notwithstanding the foregoing, you don't have any recourse
4 against affiliates of Celsius. And he says, well, that
5 doesn't really make sense. Shouldn't you just -- you should
6 remove the word affiliate there. That couldn't possibly be
7 what was intended. But it's entirely consistent because the
8 entire purpose of the terms of use is to have Celsius be the
9 obligor on account of customer claims.

10 THE COURT: I know. I mean, what Mr. LeBlanc is
11 arguing, the purpose is to make LLC liable to customers, not
12 to have affiliates liable. That's Mr. LeBlanc's argument.
13 That's why he says affiliate is put in there, to make clear
14 that affiliates are not liable to customers.

15 MR. KOENIG: Well, if the intent was to make only
16 Celsius Network LLC liable to customers, this provision
17 would have been written you only have liability against
18 Celsius Network LLC. You wouldn't say Celsius and then cut
19 out all affiliates. If you cut out all affiliates, that
20 removes Celsius Network LLC as well because that's what the
21 words on the page say. And they're all affiliates of each
22 other. So Mr. LeBlanc in his reply brief says, you know,
23 what I like to call lawyer math, you know, LLC plus
24 affiliate, minus affiliate, equals LLC. That's not actually
25 what it is. It's Celsius minus affiliate, that would

1 actually leave no one. It doesn't leave LLC, because
2 they're all affiliates of each other. That can't mean what
3 it's supposed to mean. The words on the page are intended
4 to capture entities outside of the structure.

5 And this is maybe a little bit of a colloquy or
6 metaphor, but if I had a group of people with me and I
7 wanted to invite them to the barbecue that I was having this
8 weekend, and I said hey, you guys should come to the
9 barbecue this weekend, but don't bring your friends. These
10 people are friends with each other. I didn't negate the
11 invite by saying don't bring your friends. It's understood
12 that these people -- that the positive invitation is part of
13 the first part and the exclusion, you know, excludes this
14 group of people. The fact that affiliates is carved out
15 doesn't render the entire sentence meaningless. It's
16 understood when read in harmony with the rest of the terms
17 of use that entities other than Celsius are excluded from
18 liability. Section 1 says that Celsius is the contracting
19 entity. Section 2 in the earn, in the custody, in the
20 obligations to return coins to customers. Says Celsius is
21 obligated to do this. So it would be very bizarre to have
22 all of these references throughout the document to say
23 Celsius owes the customer some sort of obligation and then
24 to bury in Section 25, in a word in the middle of this very
25 long provision, you know, actually, we didn't mean that

1 Celsius has obligations here, we really meant Celsius
2 Network LLC has obligations to you.

3 THE COURT: I have to say I didn't focus before
4 Mr. LeBlanc pointed this out to me, that the prior versions
5 of the terms of use, pre Version 6, included the word
6 affiliate in the limitation on liability. That's not
7 something new that just got added in Version 8 or Version 6,
8 7, and 8. And his argument -- what that means is when CNL
9 was the customer-facing entity, yeah, it was liable for
10 customer claims, but affiliates were not. Do you agree with
11 that?

12 MR. KOENIG: I think that -- I understand the
13 argument that Mr. LeBlanc is making. But I think that part
14 of it is part of the migration of the customer relationship
15 --

16 THE COURT: I know. You refer to migration of the
17 customer relationship. Do you agree that CNL and CNL alone,
18 not affiliates of CNL, were liable on customer claims?

19 MR. KOENIG: That's the way that the document
20 reads. It excluded Celsius' affiliates at that time.

21 THE COURT: So the customer-facing entity was the
22 one that was liable on customer claims, not any of the
23 others?

24 MR. KOENIG: That's right, at that time. But
25 after the migration --

1 THE COURT: And you think that -- what is it after
2 the migration that suggests, oh, we didn't really mean that,
3 now we agree that every affiliate is liable for customer
4 claims?

5 MR. KOENIG: Because of what I said earlier, Your
6 Honor, which is CNL is the top entity and was the entity
7 that held all of the coins and made the investments and made
8 the loans and all of those sorts of things.

9 The purpose of this language is that after the
10 prior customer relationship and some but not all of the
11 coins migrated down to LLC, there are now customer coins at
12 multiple entities.

13 THE COURT: Let me ask this. GK8 and Loan existed
14 before the migration?

15 MR. KOENIG: No, Your Honor. GK8 was purchased
16 after the migration.

17 THE COURT: The lending affiliate existed before?

18 MR. KOENIG: I believe that the lending affiliate
19 was created as part of the migration. There was a new U.S.
20 entity that made the loan program.

21 THE COURT: So tell me then which affiliates pre-
22 migration, which affiliates were not liable for customer
23 claims.

24 MR. KOENIG: I think the mining company, Your
25 Honor, is what you're looking for.

1 THE COURT: Okay. And what is it to suggest in
2 the language that Celsius intended for mining to be liable
3 for customer claims after the migration? Because that --
4 you agree I take it that if I accept your argument, mining
5 is liable for customer claims.

6 MR. KOENIG: I agree with that, Your Honor. And
7 your point is -- point to me where Celsius intended Mining
8 to now be liable when it was not -- when it was not liable.

9 THE COURT: What am I looking at -- I mean, the
10 whole -- nobody has really pointed to a whole lot of what I
11 would consider extrinsic evidence. But such as it is, I've
12 looked at it. And I don't really see anything that suggests
13 that they did intend to make Mining liable for customer
14 claims after the migration.

15 MR. KOENIG: Your Honor, what I would say is I
16 don't think that was something that was specifically
17 contemplated at the time. What I think happened is when the
18 customer-facing relationship moved down from CNL to LLC,
19 there were now customer points at two legal entities where
20 there were not before, CNL and LLC.

21 THE COURT: Because not everything migrated.

22 MR. KOENIG: Because not everything migrated. You
23 see in our schedules and statements we disclose that over a
24 billion dollars remains at CNL. They continue to run the
25 institutional loan book, as Mr. LeBlanc said. So it was

1 important to make sure that now more than one legal entity
2 became liable. So the language was changed to ensure that
3 that was the case.

4 Now, when the language is clear and unambiguous,
5 we apply it as written. I don't think the -- I can't point
6 to a document that says that somebody at Celsius intended to
7 make the mining company liable, but they did intend to keep
8 CNL and LLC liable. And I think an offshoot of the language
9 --

10 THE COURT: The unintended consequences that
11 Mining (indiscernible).

12 MR. KOENIG: Exactly right, Your Honor. I'm not
13 saying that they had to specifically intend that each and
14 every entity became liable --

15 THE COURT: Then when they acquired GK8, it became
16 liable.

17 MR. KOENIG: It became liable. What they did
18 intend I think and what I believe the redline to the
19 document suggests is that they intended to make more than
20 one legal entity liable before the migration was only CNL.
21 Then it was CNL and LLC --

22 THE COURT: And is there anything to suggest that
23 they intended to make anything other than customer-facing
24 entities liable to customers?

25 MR. KOENIG: Well, Your Honor, after the

1 migration, CNL was no longer a customer-facing entity.

2 THE COURT: Well, I thought you said it has a
3 billion dollars in --

4 MR. KOENIG: But it's no longer a customer-facing
5 -- it no longer interacts with customers directly. That's
6 the whole point of migration. It owes an intercompany claim
7 to LLC on account of those assets.

8 THE COURT: Okay.

9 MR. KOENIG: But then there's a lending entity
10 that was set up that issues loans. And so I think it's
11 those three entities -- I think it's those three entities at
12 the very least.

13 THE COURT: Okay, very good. Can you address the
14 issue of 13.3? The Committee is the one that really argued
15 that, but...

16 MR. KOENIG: Certainly, Your Honor. And we --
17 Section 13.3 is not -- there are many sections of the
18 provisions that I think if any of the lawyers here today
19 were to rewrite on a blank slate might be drafted a little
20 bit more artfully.

21 So what I would say about Section 13.3 is it
22 suggests that creditors have rights under applicable law.
23 Applicable law includes contract law, and contract law refers
24 back to the terms of use, which are replete with references
25 to how Celsius owes obligations to customers. So --

1 THE COURT: Basically you would agree with Mr.
2 LeBlanc that 13.3 doesn't really move the needle. You have
3 to look at what the contract -- who -- it didn't create a
4 special rule to bankruptcy in the event of bankruptcy. Non-
5 bankruptcy law, contract law says that only LLC is liable,
6 then 13.3 doesn't change that result.

7 MR. KOENIG: Your Honor, what I would say is I
8 don't think that 13.3 is a tie-breaker. I don't think it is
9 the important section. What I do think is, as Your Honor
10 found in the earn opinion, courts should read contracts to
11 be harmonious with each other. And I think that this
12 provision is harmonious with all of the other provisions
13 that suggest that Celsius is liable to customers. I don't
14 think that this provision is the gotcha or the most
15 important provision in the document. But I do think it's
16 relevant to Your Honor's analysis because you can look at
17 Section 1 and Section 2, Section 13, Section 9, Section 11,
18 Section 25 and read them all harmoniously to mean Celsius
19 owes obligations to customers. I don't think that this
20 provision is the most important provision in the document
21 that says that though.

22 THE COURT: So I really asked this of Mr. LeBlanc.
23 I'll ask of you. Did the migration plan require CNL be
24 relieved of liability to accountholders?

25 MR. KOENIG: Your Honor, that's not the way that

1 we read the documents. It says that they intended to
2 transfer the customer-facing relationship to LLC. But that
3 doesn't mean that it would be absolved of liabilities to
4 customers.

5 THE COURT: So Mr. LeBlanc pointed to his Exhibit
6 12, an email between Roni Pavon and people at the FCA,
7 included people at the FCA, and he pointed to Page 100 of
8 158, Paragraph 3, upon withdrawal and completion of the
9 migration plan, Celsius Network Limited will have three main
10 activities. It will control the assets that are
11 attributable to account -- accounts of users that did not
12 agree to be migrated will continue to have a debt
13 relationship with those users with respect to equivalent
14 asset. But I don't see where it says and CNL will continue
15 to be liable to all accountholders.

16 MR. KOENIG: Your Honor, I was listening to
17 everything that Mr. LeBlanc told you. I would admit that
18 that is the document that is the most persuasive from his
19 perspective. It is the one document that he has pointed to
20 that suggests that --

21 THE COURT: there you go.

22 MR. KOENIG: -- liabilities were not extinguished.
23 What I would say is that document is not in the terms of
24 use, that document is not in a relationship with customers.
25 And where Your Honor started with this is that Mr. LeBlanc's

1 clients do not -- you know, Mr. LeBlanc is pointing to the
2 terms of use, not other documents. An email between Celsius
3 and its regulators does not alter the words on the page and
4 the contractual relationship that they have with their
5 customers.

6 And just going back to my argument earlier about
7 the top holding company and the migration down. As I said,
8 it's the top holding company, it owns the shares of the
9 affiliates. So the obligations of the subsidiaries are
10 going to ultimately flow up to CNL. And that's another
11 reason -- that's another reason for the change.

12 THE COURT: A parent doesn't become liable for the
13 debts of its subsidiary.

14 MR. KOENIG: No.

15 THE COURT: Its stock may be worthless at that
16 point if the subsidiary is insolvent, but it doesn't mean
17 that the parent is liable. I mean, that's the whole concept
18 of corporate separateness.

19 THE COURT: No, I'm sorry, Your Honor. You're
20 totally right. I meant that the value of the subsidiaries
21 would be affected and it would indirectly affect CNL in that
22 way. And that's one of the reasons why you wouldn't have it
23 that way.

24 THE COURT: I think I know your answer to this,
25 but did the description of the changes in the terms of use

1 Version 6 say that CNL would no longer be liable to Earn
2 account holders. It just says -- transfers the obligations,
3 but there's nothing -- Mr. LeBlanc would argue that that
4 language about rights and obligations means that CNL is no
5 longer liable. Those words aren't on the page, but
6 (indiscernible). It's on a click box.

7 MR. KOENIG: Yes, Your Honor. And those words are
8 important words. It's the difference between a mere
9 transfer and a novation, especially when -- especially when
10 faced with all of the different references in the terms of
11 use.

12 THE COURT: I looked, again, last night at the
13 briefs. Did anybody point to controlling New York law for
14 what's required for a novation?

15 MR. KOENIG: I don't believe that I saw it, Your
16 Honor.

17 THE COURT: I didn't --

18 MR. LEBLANC: Your Honor, Andrew LeBlanc. Yes. I
19 was going to address this on reply.

20 THE COURT: Okay, that's fine. You can address it
21 on -- I didn't remember -- you know, I searched, it was
22 late, and I just didn't see it. Go ahead.

23 MR. KOENIG: Okay, Your Honor. Your Honor, that's
24 all I have.

25 THE COURT: Okay. Let me see if I have any more

1 questions for you. Okay, I don't. Go ahead.

2 Mr. Hershey?

3 MR. HERSHEY: Yes. Good afternoon, Your Honor.

4 Sam Hershey from White & Case on behalf of the Unsecured
5 Creditors' Committee.

6 Your Honor, one month ago, Your Honor ruled that
7 the assets the Debtor's accountholders transferred into the
8 Earn program are not property of those customers but are
9 rather property of the estate.

10 THE COURT: And that's being appealed.

11 MR. HERSHEY: I'm sorry, Your Honor?

12 THE COURT: And it's being appealed.

13 MR. HERSHEY: And it's being appealed. That's
14 true, Your Honor.

15 The Series B seeks to take that ruling to an
16 extreme and unjustified result, which is that accountholders
17 somehow contractually released their claims to those coins,
18 and those coins now belong to the Debtor's equity. To put a
19 finer --

20 THE COURT: May I ask you this? I don't remember,
21 but I think this is right, 55 percent of the account holders
22 were pre Version 6, is that correct?

23 MR. HERSHEY: Correct, Your Honor.

24 THE COURT: But does that mean that 45 percent of
25 the customers who are Version 6 forward all agreed that CNL

1 is not liable? In other words, I can understand if Versions
2 1 through 5 made CNL liable and there was no express
3 language the CNL is no longer going to be liable, okay,
4 maybe those 55 percent of the accountholders have an
5 argument we don't have a claim against CNL. But would it be
6 true for the 45 percent that are Version 6 forward?

7 MR. HERSHEY: Yes. And we would be, Your Honor.

8 THE COURT: Why? I don't follow.

9 MR. HERSHEY: Well, I think that's what the terms
10 of use say. They say that --

11 THE COURT: Do they really?

12 MR. HERSHEY: Yeah, they do, Your Honor. Because
13 all customers from Version 6 forward agree to terms of use
14 between themselves and Celsius Network LLC and all of its
15 affiliates. That includes --

16 THE COURT: But you argue in your brief that
17 there's no written novation.

18 MR. HERSHEY: Correct, Your Honor.

19 So if CNL were liable before under Versions 1
20 through 5 and there's no novation as to the 55 percent of
21 the accountholders who were pre Version 6, those
22 accountholders say CNL, I never -- there was no release, I
23 didn't see anything about release. Okay. But that same
24 argument can't exist with respect to the 45 percent who are
25 Version 6 forward because they were never -- CNL was never

1 the customer-facing entity. CNL never had expressly said we
2 are obligated to you. So do the 45 percent of Version 6
3 forward, are they differently situated than the 55 percent
4 that are pre Version 6?

5 THE COURT: Yeah. I think the point Your Honor is
6 making is that there are more arguments available to the 55
7 percent in terms of CNL's liability than there are to the 45
8 percent. And I'm not going to contest that. I would say
9 that a hundred percent of creditors though have the argument
10 that Version 6 forward of the terms of use provide that all
11 debtor affiliates are liable to customers. And there may be
12 some who have additional arguments --

13 THE COURT: You would agree that your argument
14 about no novation doesn't exist with respect to the Version
15 6 forward?

16 MR. HERSHEY: To the extent they weren't
17 previously contracting CNL, yes, Your Honor. Okay.

18 And, Your Honor, I just want to put a finer point
19 to that. Because I think actually what's happening in
20 Version 6 is a maintenance of the status quo, not a change.
21 Because previously all customers had claims against the
22 enterprise value of Celsius. Because it all flows up to
23 CNL. And through Version 6, now there is a new customer-
24 facing entity. That's LLC, the U.S. entity. But going
25 along with that is a new --

1 THE COURT: The creditor -- if Mining is solvent,
2 creditors of mining are going to have their claims satisfied
3 with Kroll before anything flows up to equity, correct?

4 MR. HERSHEY: That's certainly true. I'll note
5 that Mr. LeBlanc's clients are not creditors of Mining,
6 they're equity holders.

7 THE COURT: That's a hypothetical.

8 MR. HERSHEY: Yes. And the residual value will
9 flow up to CNL and then there's a residual claim that all
10 creditors have against CNL. This is just a maintenance of
11 that position.

12 Your Honor, I want to speak about the terms of
13 use. I also want to talk about the extrinsic evidence.

14 Your Honor may recall that when Mr. LeBlanc first
15 stood at this podium to discuss this matter, he said that
16 the terms of use unambiguously favor his position, but there
17 is also extrinsic evidence. And it seems like there has
18 been a very heavy reliance on extrinsic evidence and very
19 little reliance on the terms of use. So I do want to
20 briefly address the extrinsic evidence just to ground set a
21 little bit.

22 The only question before the Court is whether the
23 customers have claims against every debtor entity. And at
24 least for the 55 percent, as Your Honor recognized, the only
25 way those customers could no longer have claims against CNL

1 is if those claims were released. The Debtors can't do it
2 for them. They can't have some back room deal where they
3 sign a release and the customers never sign it, never see
4 it. And that release has to be explicit. That's what New
5 York law provides. And I can cite the case that's in our
6 brief that we cited for this proposition. It's the Elbit
7 Systems case. And the Southern District of New York in that
8 case explicitly said, "A release will not be given effect
9 unless it contains an explicit, unequivocal statement of a
10 present promise to release a party from liability." And I
11 think Your Honor honed in that issue, and that's exactly
12 right. Nothing Mr. LeBlanc has pointed to shows an explicit
13 release by at least 55 percent of the customers of their
14 claims against CNL.

15 Now, we happen to believe, and we'll argue that
16 the terms of use create a claim for the other 45 as well.

17 THE COURT: Well, let me ask you this. So the 55
18 percent who were pre-Version 6, they checked the box and
19 accept Version 6, 7, and 8. And let's assume hypothetically
20 that their account balance pre-Version 6 was 50 bitcoin.
21 And the account balance post Version 6 was 100 bitcoin. Is
22 their claim different as to the first 50 versus the next 50
23 that were invested?

24 MR. HERSHEY: I don't think it would be, Your
25 Honor. Because they still have a contractual claim against

1 CNL. And CNL is still providing services to them. And
2 that's one thing I'll talk about in a minute, is that this
3 migration and supposed change of who CNL is contracting with
4 never actually happened. And it wasn't, as the evidence
5 will show, the intent of Celsius for that to happen.

6 THE COURT: I know. You said it stayed the same
7 wallets and...

8 MR. HERSHEY: All that. Yeah. Exactly, Your
9 Honor.

10 Your Honor, the second point I want to make that's
11 just sort of a broad overview of where I think the extrinsic
12 evidence leads us is that whatever evidence the Series B may
13 have, they claim evidence is the Debtor's intent. These are
14 relevant to the extent that intent was not communicated to
15 the accountholders, right? There may be statements that the
16 Debtors made to other parties other than the accountholders
17 that express an intent. But if the other party to the
18 contract was not aware of that, then that evidence is
19 completely irrelevant. And again, we have New York law that
20 stands for that proposition.

21 THE COURT: So with respect to an accountholder
22 that opens this account, Version 6 or after, your argument
23 is that the opening clause that says Celsius and its
24 affiliates controls as opposed to Paragraph -- the word, the
25 one word in Paragraph 25, which I hadn't realized and Mr.

1 LeBlanc pointed out was there all along. It's not as if it
2 was just added in Version 6, it was there in prior versions.

3 MR. HERSHEY: Yeah, that's correct, Your Honor.

4 Yes. I'm happy actually -- it probably makes sense right
5 now, because I think the law directs us to examine the terms
6 of use first before we talk about extrinsic evidence. I'll
7 start there. And I'm actually going to use the redline that
8 Mr. Koenig handed up to you. I realize that the changes in
9 the redline are technically extrinsic evidence. It will
10 just be easier if I can make all my points regarding the
11 terms of use at once and not just what it says, but the
12 changes.

13 So Mr. Koenig stole my thunder a little bit
14 because I was also going to emphasize that if you look at
15 the first sentence, the first thing that a customer of
16 Celsius would see, the first thing the drafters chose to put
17 in, Celsius Network LLC and its affiliates, new language,
18 collectively, new language. And also I will observe
19 provides, previously was singular, now it is plural, and now
20 provide the terms of use. So there's no doubt that the
21 intention of the drafters was to make these terms of use
22 binding on Celsius Network LLC and its affiliates.

23 Going further down in that same paragraph, the
24 last sentence, the drafters of the terms of use identify a
25 specific Celsius entity, right? Celsius EU UAB, showing us

1 that if they wanted to identify a specific Celsius entity,
2 they knew how to do so. But if they're using the defined
3 term Celsius, which only exists in the context of these
4 terms of use -- it's not an actual entity, it's nowhere on
5 the Debtor's org chart. If they're using that defined term,
6 it has to have the meaning that it has in the first sentence
7 of the terms of use.

8 Going to the next page, there are two paragraphs
9 in big block letters. Again, these are new. The drafters
10 chose to add them. The first one says, "Celsius is a
11 lending and borrowing platform. When you transfer digital
12 assets to Celsius, those digital assets are a loan from you
13 to Celsius."

14 The next paragraph. "All digital assets
15 transferred to Celsius as part of the services --" Yeah.

16 THE COURT: Mr. Hershey, I understand all of that.
17 Move to Paragraph 25.

18 MR. HERSHEY: Would Your Honor like me to stop at
19 Paragraph 13, or should I proceed to 25?

20 THE COURT: If you want to go to 13, go ahead. I
21 don't -- I mean, I thought you made a nifty argument from
22 Paragraph 13, but you sort of selectively chose the words
23 that you would quote in your brief. And, you know, when I
24 printed out all of Paragraph 13 and all of Paragraph 25, you
25 know, my reading was, you know, affiliate is one word in the

1 middle of a very long paragraph, the reference to bankruptcy
2 in 13.3, I don't know really whether it does anything other
3 than suggest that you may be a creditor, but it's all going
4 to depend on non-bankruptcy law. Well, non-bankruptcy law
5 includes contract law.

6 And so if your contract right leaves you with a
7 claim only against LLC, Paragraph 13.3 doesn't change that.
8 Do you agree with that?

9 MR. HERSHEY: Your Honor, I do agree with that. I
10 don't think that this terms of use can modify the law if the
11 law provides something.

12 THE COURT: No. But just on this basic point. If
13 Paragraph 25 were interpreted such that the customers only
14 had a contract claim against LLC, Paragraph 13.3 would not
15 change that result.

16 MR. HERSHEY: So, I'm actually not sure that I
17 agree with that, Your Honor, for two reasons. The first is
18 that the specific governs over the general, as Your Honor
19 said. And this is a specific contemplation of a bankruptcy
20 scenario. And this isn't a very broad grant of rights in a
21 bankruptcy scenario. If you read the words, I'll start
22 second half of the sentence.

23 THE COURT: Yes, but let me just --

24 MR. HERSHEY: (indiscernible)

25 THE COURT: In reading (iii), "In the event that

1 Celsius becomes bankrupt, enters liquidation or is otherwise
2 unable to repay its obligations, you may not be able to
3 recover or regain ownership of such digital assets. And
4 other than your rights as a creditor of Celsius, under any
5 applicable laws you may not have any legal remedies or
6 rights in connection with Celsius' obligations to you."

7 Doesn't that mean that your rights as a creditor
8 of Celsius by virtue of Paragraph 25 are limited to claims
9 against LLC? 13(iii) doesn't change that outcome. In
10 bankruptcy, you get whatever your non-bankruptcy law rights
11 are.

12 So the basic point that I took away from it -- and
13 I'm asking whether you agree or disagree, and if you
14 disagree, explain to me -- 13(iii) does not add anything to
15 Section 25. Whatever your rights are under Section 25, if
16 your rights are against CNL, 13 doesn't change it. If your
17 rights are only against LLC, 13 doesn't change it. It's
18 just agreeing with the Bankruptcy Code. Do you agree with
19 that?

20 MR. HERSHEY: So, I do agree with that, Your
21 Honor.

22 THE COURT: Okay.

23 MR. HERSHEY: I will note, though, that if we're
24 looking at the intent of the drafters, it specifically says
25 creditor of Celsius with a capital C. It says under any

1 applicable law. It says, you know, broad as possible
2 (indiscernible) available. Celsius --

3 THE COURT: If I agree with you that Section 25
4 doesn't absolve CNL of liability, then under Section 13, you
5 assert that right in the bankruptcy. If Paragraph 25, if I
6 agreed with Mr. LeBlanc that Paragraph 25 is effective to
7 exclude liability of CNL, 13 doesn't change that result.

8 MR. HERSHEY: So, I agree, Your Honor. It makes
9 sense to turn to Section 25.

10 THE COURT: Okay.

11 MR. HERSHEY: (indiscernible)

12 THE COURT: All right.

13 MR. HERSHEY: So I think there are a few points
14 that need to be made on the Section. And the first is the
15 most important. It's the point that Mr. Koenig has already
16 made. There is no need to read the Section any other way
17 than the way it's written. There is a totally harmonious
18 way of reading Section that holds that the second mentioned
19 affiliates is affiliates of affiliates. They can exist,
20 even if they're purely conceptual. Parties routinely will
21 draft contracts to involve conceptual entities that may not
22 exist at the time. Your Honor --

23 THE COURT: I can't imagine any lawyer drafting a
24 section with these words if what they were trying to
25 communicate was that affiliates of affiliates aren't liable.

1 MR. HERSHEY: Your Honor, I mean, I disagree. I
2 think that if, for example -- I think Mr. Koenig gave this
3 example. If an affiliate of Celsius had a contractual
4 relationship with a third party, it would make perfect sense
5 that Celsius would want to insulate -- Celsius would want to
6 insulate that third party from claims.

7 THE COURT: They still wouldn't have drafted this
8 paragraph this way. It would've been much clearer about
9 what the exculpation or limitation of liability would be.
10 They never would draft something like this.

11 MR. HERSHEY: Well, then --

12 THE COURT: It is what it is.

13 MR. HERSHEY: Sure. Absolutely, Your Honor. So I
14 think, then, we have to look at how we should read Celsius,
15 to the extent the drafting is ambiguous. And the first
16 thing is, as I said, there's no such thing as Celsius within
17 the Debtors' corporate enterprise, right? It's not on the
18 org chart. It only has meaning within the terms of use. So
19 it means Celsius LLC and its affiliates.

20 But if we were to choose another meaning for it,
21 it would make much more sense if we had to choose one
22 (indiscernible) say it wouldn't make sense. It wouldn't
23 make sense to choose Celsius (indiscernible) LLC. There is
24 nothing in the terms of use indicating that Capitol C
25 Celsius could mean Celsius Network LLC.

1 Now, if the defined term Celsius did previously,
2 for all prior versions of the terms of use, means Celsius
3 Network Ltd, that's what it always meant. So if we're
4 trying to identifying one Celsius entity that made the most
5 sense to substitute in for Celsius, to (indiscernible)
6 someone to do that, Celsius Network Ltd would make a lot
7 more sense.

8 But besides that, Your Honor, in another -- I
9 mean, another option that we could use is we could ignore
10 the second use of the word affiliates. We could understand
11 there was a change in the meaning of Celsius and perhaps the
12 drafters --

13 THE COURT: But that word was always there. It's
14 not as if that word was added and --

15 MR. HERSHEY: Sure. But the fact that it was kept
16 in and not removed could be a reflection of the fact that
17 the drafters of the contract ignored or missed that they had
18 redefined Celsius to include affiliates and they kept it in.
19 That would be our harmonious reading too.

20 Whichever reading Your Honor chooses --

21 THE COURT: You're arguing for scrivener's error.

22 MR. HERSHEY: Well, that would be --

23 THE COURT: Which has a very, very, very high
24 standard to satisfy.

25 MR. HERSHEY: Well, I think that -- I think that

1 so are the serious (indiscernible). I mean, I think
2 everyone who wants to advance a different interpretation of
3 this clause has to argue there is a mistake that has to be
4 rectified. And I'm just running through the different
5 options.

6 THE COURT: Well, Mr. LeBlanc doesn't say there's
7 a mistake that has to be rectified.

8 MR. HERSHEY: I think he does, Your Honor. He
9 says that it doesn't make sense for Celsius here to have the
10 meaning that it's clearly given in the terms of use.

11 THE COURT: I don't think he's saying that.
12 (indiscernible) Look, what I understand the Series B
13 Noteholders to argue is that for the purposes of the
14 agreement as a whole, it refers to Celsius and its
15 affiliates. Section 25, a portion of it, small portion of
16 it, creates a limitation of liability such that any
17 affiliates of LLC are excluded from liability for customer
18 claims. That's what he's arguing.

19 MR. HERSHEY: But the only to read it that way is
20 to change the defined term Capital C Celsius to something
21 the terms of use expressly says it must not mean.

22 THE COURT: I don't think so. I mean, I think --
23 I'm not sure I buy his argument, but he says, "For purposes
24 of this agreement as a whole, Celsius and affiliates." But
25 when you get down to who the customers have claims against,

1 it's just LLC, all because of this word affiliates stuck in
2 the middle of a long paragraph.

3 MR. HERSHEY: I agree that's his argument, Your
4 Honor. I don't see how he could make that argument without
5 arguing there was a mistake in use of the defined term
6 Celsius. And that really what that means is LLC. There is
7 nothing in the terms of use that says Celsius can mean LLC.
8 Quite the opposite. It says Celsius Capital C, means
9 Celsius Network LLC and its affiliates.

10 THE COURT: Except for purposes of Section 25.

11 MR. HERSHEY: No -- but where does the terms of
12 use say that, Your Honor? Except for purposes of this
13 section, Celsius shall mean only Celsius Network --

14 THE COURT: It says, "Without limiting the
15 generality of the foregoing, in no event shall you have any
16 recourse, whether by setoff or otherwise, with respect to
17 our obligations to or against any assets of any person or
18 entity other than Celsius, including without limitation, any
19 members, shareholder, affiliate, investors." So that's the
20 carveout.

21 MR. HERSHEY: I completely get that, Your Honor.
22 I guess where I don't understand --

23 THE COURT: Okay.

24 MR. HERSHEY: -- Your Honor's position,
25 respectfully, is --

1 THE COURT: It's not my position, but --

2 MR. HERSHEY: Oh, sorry. Well, okay -- perhaps
3 Mr. LeBlanc's position. Your question, I should say, is how
4 Celsius and what in this term says anything on Celsius
5 meaning anything other than what (indiscernible) -- it just
6 doesn't say in this term, Celsius means Celsius Network LLC.
7 Nothing in the terms of use says that any (indiscernible)
8 Celsius can mean Celsius Network LLC. It's completely made
9 up. It's a --

10 THE COURT: Okay. All right.

11 MR. HERSHEY: -- it's the entity he wants it to
12 me.

13 THE COURT: Okay. I have your argument. Go
14 ahead.

15 MR. HERSHEY: Okay. And the last thing I'll say,
16 Your Honor, is to the extent Your Honor is going to construe
17 the contract in either direction, this is a contract of
18 (indiscernible) and we also cite law (indiscernible) showing
19 that it should construed against the Debtors to provide
20 maximum liability among Debtor entities to protect customer
21 claims.

22 THE COURT: Okay. Thank you very much.

23 MR. HERSHEY: Your Honor, may I address the
24 extrinsic evidence?

25 THE COURT: Yes, please go ahead.

1 MR. HERSHEY: Thank you very much. So, Your
2 Honor, on the checkboxes that Mr. LeBlanc mentions, I have
3 just a few points. The first is, Your Honor has already
4 recognized this, almost half of the customers
5 (indiscernible) settlement. And so that's why I think we
6 need to have recourse in the contract itself and not in the
7 checkboxes.

8 The second thing is that the first checkbox says,
9 "I have read and agreed to the new terms of use." It would
10 be absurd to think that after agreeing to the terms of use,
11 the checkboxes somehow modify them.

12 And the third thing is the checkbox that Mr.
13 LeBlanc seizes on is not a release. We have discussed this
14 release needs to be explicit. There is no release there.

15 THE COURT: Is the law on novation, New York law,
16 any different than the law on releases? I asked this
17 question earlier today whether -- because I didn't see your
18 brief -- you raised the issue, it's a novation -- they're
19 arguing for a novation and say it's not. But I don't -- if
20 I missed it, tell me. I didn't see -- I'll look myself, but
21 I didn't see case law about what are the elements under New
22 York law for an argument about the claim of novation,
23 defense of novation. I don't know (indiscernible) claimed
24 by the defense, but...

25 MR. HERSHEY: So, Your Honor, I do not know the

1 answer right now off the top of my head. I will say one
2 thing, which is that the case that I cited to earlier was
3 categorical in saying a release cannot occur. That's
4 explicit. I haven't seen any case that says, oh, actually,
5 you can get around a release and not have to be explicit if
6 you style it as a novation.

7 THE COURT: My only question was do you have the
8 law?

9 MR. HERSHEY: No. And Your Honor, I don't at the
10 moment. Happy to submit some supplemental (indiscernible),
11 if Your Honor you would like.

12 The last thing -- the last point I want to make,
13 Your Honor, is this much vaunted migration that Celsius
14 purportedly sought to (indiscernible). Never actually
15 happened. And we know this in a few ways. The first is
16 that on the schedules, the schedules that the Debtors
17 submitted -- this is Exhibit 2 on our exhibit list -- the
18 schedule for Celsius Network Ltd. still reflects about \$1
19 billion of assets. And in the 341 meeting -- that's -- and
20 the transcript (indiscernible) that is Exhibit 6 on our list
21 -- we asked Mr. Ferraro what that billion dollar worth of
22 asset is. And he said that it's predominantly customer
23 coins.

24 We also asked the Debtors in discovery to produce
25 all documents to us evidencing migration assets from CNL to

1 LLC. And the response we got was that were no documents
2 they could give to us, other than what's publicly available.

3 But the last piece of evidence I want to cite --
4 and this will conclude my presentation -- is the examiner's
5 report, which came out last week. The examiner, among other
6 things, took a very thorough look, as she described it, and
7 I'll just read the section title. It's Section 9 review of
8 where crypto assets were held pre and post-petition.

9 THE COURT: I have the greatest respect for the
10 examiner. But the report is hearsay. It is not evidence.
11 And have you all agreed that it's evidence for purposes of
12 this hearing?

13 MR. LEBLANC: We have not, Your Honor. In fact --
14 Andrew LeBlanc -- we have not and it's not on any of our
15 exhibits.

16 THE COURT: Okay. You know, let's be careful.
17 And I -- by saying that, no disrespect at all for the
18 examiner, who I commented before I think she's done a
19 terrific job. But I asked the question of Mr. Lazar at one
20 of the hearings, whether because it refers to the interviews
21 that the examiner conducted -- I asked whether they were
22 under oath, and it was explained to me they were not. So,
23 at this stage, it's hearsay.

24 MR. HERSHEY: So, Your Honor, a question and one
25 quick point. Just to be clear --

1 THE COURT: It would be hearsay even if there were
2 interviews under oath. But nevertheless --

3 MR. HERSHEY: That was my question. If you were
4 asking about interviews, whether the examiner's summarizing
5 interviews, if that's your concern, just stating --

6 THE COURT: No, it's not. It's --

7 MR. HERSHEY: Okay. I just wanted to clarify
8 that. I am using the exhibit on -- or the report, I guess,
9 on rebuttal. So I'm sure it was not our exhibit list. I am
10 happy to walk through what the examiner says because she
11 does address this point directly and reaches the conclusion
12 that there was no migration or perhaps even intent. But if
13 Your Honor would rather I --

14 THE COURT: I'd rather you not do it.

15 MR. HERSHEY: Okay. Thank you, Your Honor.

16 THE COURT: Okay. Thank you. Mr. LeBlanc?

17 MR. LEBLANC: Thank you, Your Honor. Andrew
18 LeBlanc. Your Honor, let me just address a handful of
19 points. And I think this -- I can do this quickly.

20 I actually think Mr. Hershey may have sort of
21 given up the game a little bit as to -- made a mistake in
22 his argument to say our interpretation doesn't make any
23 sense because nowhere is Celsius LLC the defined Celsius.

24 Our point is this. And Mr. Koenig referred to it
25 as lawyer math. I was an engineer, so I enjoy math. But --

1 THE COURT: What kind of an engineer were you?

2 MR. LEBLANC: Aeronautical, Your Honor. So, when
3 I -- and it's funny, because we've had this debate
4 internally on our team. It think of this quite simply as an
5 equation where you have Celsius equals LLC plus affiliates.
6 The limitation of liabilities --

7 THE COURT: Yes, I saw the briefs with equations.

8 MR. LEBLANC: Well, yes. And Your Honor, that's
9 the way -- I mean, we tried to present it a number of
10 different ways because that's the way that I think of it.
11 And it makes sense to me that --

12 THE COURT: I hate to break the news that I was an
13 engineer too, Mr. LeBlanc.

14 MR. LEBLANC: May I ask what kind, Your Honor?

15 THE COURT: But I try not to use equations in my
16 opinions.

17 MR. LEBLANC: Well, we were trying to offer it a
18 number of different ways. And I think what's important is,
19 because this is really the point, they made a conscious
20 choice to define Celsius to be LLC and its affiliates, and
21 not CNL and its affiliates. They made that change from the
22 prior version. So that when you take out affiliates, as
23 they do in Section 25, what is left is LLC, not CNL.

24 If all they intended to do was to create liability
25 at every entity, then they could have done that simply by

1 saying CNL and its affiliates are now the counterparty, and
2 then you'd have the same issue with Paragraph -- with
3 Section 25.

4 But they made the second change of making LLC the
5 party. And that, Your Honor, is -- and I think Your Honor
6 recognized this in your discussion, your colloquy -- we do
7 not argue there's a scrivener's error. We argue that this
8 is what is intended, that the customer-facing entity is
9 supposed to be liable.

10 THE COURT: Whether you really expected anybody to
11 understand what's in that Paragraph 25 is a different issue,
12 I think, you know? That's why with clickwrap contracts,
13 when -- and maybe you're saying there was no change --
14 that's one of the reasons I was asking about whether this
15 was a change. Ordinarily, when there's a material change,
16 there's something that describes, and there are three
17 important changes in this contract, one of which is to
18 absolve CNL of liability. Well, I don't do that.

19 MR. LEBLANC: Well, Your Honor, I mean, that is
20 exactly what they -- exactly what they do is the party
21 you're contracting with this changing to this party. And
22 this is where the law of novation becomes critical. It is
23 not -- the relevant law is not the law of releases. It is
24 the law of novation. And we cite, Your Honor -- and I
25 appreciate, it comes at the end of our brief --

1 THE COURT: Okay. I've got the brief here.

2 MR. LEBLANC: Our opening brief, beginning at Page
3 27 -- so that's Docket Number 1795.

4 THE COURT: I got -- turn to Page 27. Okay.

5 MR. LEBLANC: 27. We have -- the final section is
6 customers released CNL from liability by agreeing to Terms
7 of Use Version 6. And this talks about -- this is the law
8 of novation in New York.

9 THE COURT: Hold on. I'm looking at the wrong one
10 of --

11 MR. LEBLANC: (indiscernible)

12 THE COURT: I've got it here?

13 MR. LEBLANC: Docket 1795.

14 THE COURT: Just a second. I actually put them in
15 order too. Okay. I'm there.

16 MR. LEBLANC: Okay. Your Honor, this page and the
17 page that follows -- so we have two pages that talk about
18 the law of novation. And what it says is, "It is well-
19 settled that where the parties have clearly expressed or
20 manifested their intention that a subsequent agreement
21 supersede or substitute for an old agreement, the subsequent
22 agreement extinguishes the old one, and the remedy for any
23 briefs thereof is to sue on the superseding agreement."
24 That is the law of novation.

25 THE COURT: So the problem I had with that

1 argument, that I have with the argument, is it clearly says
2 they transferred obligations, which makes perfect sense. If
3 LLC becomes the customer-facing entity, if that's who you're
4 dealing with, they transferred the obligations. Okay? But
5 the words do not say, and discharge released the liability
6 of CNL.

7 MR. LEBLANC: But Your Honor, the point is, we do
8 not -- I do not believe you need a release to have that be
9 effective. You need to have a superseding contract that
10 provide -- if you agree with us on the interpretation of
11 Section 25 under Versions 6, 7 and 8, the fact that they
12 entered into Versions 6, 7 and 8, and people operated --
13 whether you did it through the clickthrough, the 55 percent,
14 or you're part of the 45 percent that joined later, you're
15 subject to Versions 6, 7 and 8 and you have no claim. Not
16 because you granted a release, but because there was a
17 superseding contract into which you entered. And so if you
18 agree with us on the interpretation, that's -- that answers
19 the question.

20 THE COURT: Let me ask you this, because I didn't
21 read the cases you cited on this page. I actually did
22 highlight it. Do any of those cases deal with the issue of
23 whether the initial obligor is released or discharged of any
24 liability to the assignee of the contract?

25 MR. LEBLANC: I believe they -- I think that's the

1 point of these cases, Your Honor, so I think they all do.
2 They're not -- I don't believe any of them are click through
3 contracts --

4 THE COURT: Yeah.

5 MR. LEBLANC: -- to be clear. But I think each
6 and every one of them --

7 THE COURT: Okay.

8 MR. LEBLANC: -- are facing the situation that
9 Your Honor is facing. That is to say that I didn't release
10 somebody else. The novation doesn't have that effect. And
11 the Court is answering that question. And under New York
12 law, that's exactly what the effect is.

13 THE COURT: I'll go back and read the cases.

14 MR. LEBLANC: Yes. Thank you, Your Honor. Your
15 Honor, a couple other points. Mr. Kwasteniet said -- and I
16 think this is a point that I think best illustrates the fact
17 that it's not just the extrinsic evidence of the Debtors'
18 intent. There is evidence and we cite this in our brief.
19 And we have a slide on it, but we don't need to go to it.
20 There is evidence that strongly suggests that customers
21 didn't even believe that they had claims against every
22 entity.

23 THE COURT: I read that. I saw that in your
24 brief.

25 MR. LEBLANC: But there's two other -- so the one

1 point is the one that we made with respect to where claims
2 were filed before this issue -- before somebody suggested
3 that they had claims everywhere.

4 But I'm going to make another point, Your Honor,
5 and that is this. Mr. Koenig said that -- he was very
6 careful to say that our position is that every Debtor is
7 responsible for creditor claims. To be clear, every entity
8 in the Celsius family under their interpretation is liable.
9 That includes many that are not Debtor entities, some of
10 which have meaningful assets.

11 To the best of our knowledge, no one has come to
12 this Court and said we need 105 relief, we need an
13 injunction to extend to these non-debtor entities, because
14 customers are showing up in droves filing claims against
15 them.

16 So the fact is that there is no suggestion that
17 customers actually believed that they had claims against
18 every entity, and instead, what the claims data -- and that
19 action is consistent with the view that we have, which is
20 that customers understood they have claims against every --
21 only against LLC, the 10,000 claims that were filed and only
22 11 against all Debtors. I think that just answers the
23 question that until a lawyer came up with this argument in
24 front of this Court --

25 THE COURT: Well, but they -- with their -- and

1 you and Mr. (indiscernible) complained bitterly or loud
2 about this when they filed schedules saying -- listing the
3 claims as against all Debtors. And one of the things that I
4 think -- I don't remember if it was Mr. Nash or Mr.
5 Kwasteniet, or who said, said we did that so they could
6 avoid having to file proofs of claims against all Debtors.

7 MR. LEBLANC: Your Honor, but I want to -- it's a
8 very, very, very good point. That is why we used claims
9 data from only going up to November 15th. So, really,
10 before this issue is percolating, in the process, we used
11 the claim --

12 THE COURT: When did they file the schedules?

13 MR. LEBLANC: I don't remember when they file the
14 schedules, Your Honor. But we had the litigation on it
15 thereafter. We can -- I can get you the answer --

16 THE COURT: (indiscernible)

17 MR. LEBLANC: -- when the schedules are filed.
18 But when we picked an earlier date, like when you're doing
19 an event study, you want to be far enough away from the
20 event so it's not -- the event itself is not affecting it.
21 And so the Creditors' Committee standing up and saying
22 (indiscernible) claims of every Debtor, writing letters that
23 we've submitted as part of our exhibits to the Debtor saying
24 you'd better make sure you're serving claims of every
25 Debtor. We tried to isolate it from that and just look at

1 what was the experience of creditors? What did they do?

2 How did they act before the influence of those issues?

3 Your Honor, had asked some questions about
4 entities that existed before the novation. Exhibit 9 in our
5 exhibits that have been admitted, that includes a pre-
6 migration org chart. It is -- I believe it's a little bit
7 out of date because we know that the mining entity existed.
8 But you can see there that a Celsius lending entity exists,
9 and subsequent to that, that changed to a different entity.

10 But the point is, Your Honor, there's all of these
11 entities there, none of which are even argued to be liable
12 to creditors under the prior version -- under Versions 1
13 through 5. In those entities all existed pre-migration.

14 Two more points, Your Honor, and then I'll
15 conclude. One, the language Mr. Hirschi just looked at with
16 you -- and I know Your Honor moved him on from this -- but
17 the two bolded paragraphs that were added to the terms of
18 use on the second page, that says, "Celsius is a lending
19 platform." And his argument to Your Honor was, see, that
20 means everybody in the Celsius family is a lending platform.

21 The problem is, that runs right headlong into the
22 limitations that the FCA put on this company. The FCA
23 couldn't have been more clear. You can't -- you, CNL, can't
24 have contractual relationships with the customers. Mr.
25 Hershey's saying, well --

1 THE COURT: But what you still haven't shown me is
2 that CNL said that you can't assume liability to customers.

3 MR. LEBLANC: Well, Your Honor, I mean --

4 THE COURT: Required that they migrate the
5 customer-facing entity, but that to me is not the same thing
6 as saying, and you're all absolved of all liability. We
7 won't let you continue to do business in the U.K. unless
8 you're absolving all liability to customers. There's
9 nothing like that.

10 MR. LEBLANC: But Your Honor, there are -- I mean,
11 we looked at this, and I know you talked about this with Mr.
12 Koenig -- it's the part that he very graciously said is
13 probably our best piece of evidence with respect to that
14 point. That email is written by one of the drafters of the
15 terms of use. And it's critical. And I know Your Honor
16 appreciates this; that's, I think, why you asked the
17 question. The fact that Mr. Cohen-Pavon is saying to the
18 FCA that we will continue to have liability to these rump
19 creditors, the clear implication --

20 THE COURT: Is that they don't have liability --

21 MR. LEBLANC: They don't have liability to the --
22 the rump creditors are going to be the handful that don't
23 accept clickthrough and accept the terms of use. They're
24 not going to be the billions of dollars of customer claims.
25 So he is reporting, and it appears in the migration plan

1 filed with them, and it appears in responses to questions
2 they ask, they are saying affirmatively to them that we are
3 migrating liabilities and we will not have those
4 liabilities. I don't --

5 THE COURT: All right.

6 MR. LEBLANC: I'm not sure how much more clear he
7 could say it. And critically, that is -- and this is in the
8 stipulated facts, Your Honor -- Mr. Cohen-Pavon is one of
9 the drafts-people of the terms of use. So you have to
10 believe that he wrote that to the U.K. regulator and then
11 turned around and unambiguously incurred unlimited
12 liabilities to all customers at CNL the day after doing
13 that.

14 And you'd also have to believe, Your Honor -- and
15 I think this connects to the last factual point I'd want to
16 make -- you would also have to believe that the company
17 entered into an asset transfer agreement and in intercompany
18 claim agreement. And to be clear, I don't know if Mr.
19 Hershey just hasn't seen this in the intercompany claim
20 agreement.

21 But the intercompany claim agreement -- we looked
22 at this, Your Honor, and I told you there weren't provisions
23 that I thought were particularly relevant -- but there is,
24 in light of the argument that was made, the suggestion that
25 there hasn't been a migration. The intercompany claim

1 agreement actually specifically says that includes assets
2 that remained at CNL.

3 So, for example, if CNL had customer assets prior
4 to the migration because it was the customer-facing entity,
5 that it had deployed in an institutional loan, and therefore
6 wasn't able to transfer them down to LLC, that became part
7 of the customer -- the intercompany claim issue. So that
8 became part of the intercompany claim. That's what that
9 agreement says.

10 And so, the idea that --

11 THE COURT: Which exhibit is that again, if you
12 would?

13 MR. LEBLANC: Yes, Your Honor. That is Exhibit
14 16.

15 THE COURT: Okay. All right.

16 MR. LEBLANC: Okay. That's the intercompany
17 operation and loan agreement, Your Honor. And I'm looking
18 in particular at Section 2.1, which is on Page 131 of 158.

19 THE COURT: Yep, I'm there.

20 MR. LEBLANC: Bates Number 633 --

21 THE COURT: Yes. Yes.

22 MR. LEBLANC: Section 2.1 in the second sentence
23 says, "The parties acknowledge that the assets also include
24 certain cryptographic assets that belong to lenders. Users,
25 as such term is defined in that certain asset transfer

1 agreement dated by and between, which were not transferred
2 from borrow to lender in connection with the transfer of the
3 transferred assets and liabilities, and that the parties
4 wish to include the assets covered -- which to include in
5 the assets covered by this agreement."

6 So, Your Honor would have to believe that when the
7 parties -- when Celsius as a company engaged in the
8 migration and determined to transfer the assets and
9 liabilities and the obligations between those two entities,
10 that it did so and included this intercompany claim
11 agreement, but did it in a way that didn't absolve, didn't
12 intend to resolve or absolve CNL of liabilities to
13 customers. It doesn't make any sense.

14 If CNL was always going to be obligated to
15 customers, if that was the intent -- and not just CNL, but
16 every entity within the corporate family -- why would you
17 even have the intercompany loan agreement? It doesn't make
18 any sense.

19 The only way that you could reconcile that is to
20 recognize that what was intended in this entire transaction
21 was to do exactly what we contend.

22 THE COURT: What about the 55 percent of account
23 holders that didn't accept Versions 6 through 8?

24 MR. LEBLANC: You mean the 40 -- do you mean the
25 45 percent that didn't --

1 THE COURT: Yeah.

2 MR. LEBLANC: -- accept, or the 55? I'm sorry,
3 Your Honor.

4 THE COURT: I thought 55 --

5 MR. LEBLANC: It was 55 percent prior to the
6 migration.

7 THE COURT: Yes.

8 MR. LEBLANC: They clicked through, checked the
9 box, actually accepted.

10 THE COURT: Okay. And 45 percent --

11 MR. LEBLANC: 45 percent came after.

12 THE COURT: Okay.

13 MR. LEBLANC: Right. And --

14 THE COURT: No, the Committees' and Debtors' point
15 is that for the 55 percent would have had claims against
16 CNL. Mr. Hershey points to Second Circuit law on releases
17 that requires they be very specific. And your answer is
18 what on that?

19 MR. LEBLANC: My answer is the relevant law --

20 THE COURT: Is --

21 MR. LEBLANC: -- is the law of novation.

22 THE COURT: Novation. Okay.

23 MR. LEBLANC: That the parties entered into a new
24 contract --

25 THE COURT: I'll read those cases that your --

1 MR. LEBLANC: Right. That the parties --

2 THE COURT: -- in your brief. I didn't read that.
3 I actually highlighted that stuff --

4 MR. LEBLANC: Yeah.

5 THE COURT: -- but I didn't read the case. Didn't
6 have time to read the cases.

7 MR. LEBLANC: And Your Honor, what is interesting
8 is I mentioned that that's in our opening brief. We did not
9 see a response to that in the Debtors' and the Committees'
10 reply briefs. And I just -- I don't think there is a
11 response. The relevant question is, when you have a
12 contract with a party, it's not a release. If you enter
13 into a new party with that contract, that supersedes the
14 pre-existing contract. That becomes the governing contract.

15 And if we are right on the interpretation, Your
16 Honor, and I think -- you know, we -- I believe we've
17 demonstrated both on the words of the contract, but also
18 more importantly on the drafting -- not more importantly,
19 because words are what are paramount -- but to the extent
20 Your Honor concludes that there is ambiguity, and the only
21 way you could do is if you believe the Debtors' argument,
22 which is that affiliates of affiliates are excluded and
23 that's all that's intended by that, and therefore, you're
24 really rendered that affiliate word just a dead letter? If
25 you believe that that's reasonable, and you believe our

1 interpretation is reasonable, then you find ambiguity and
2 you turn to extrinsic evidence.

3 If you don't believe their interpretation is
4 reasonable, then you rule in our favor. If you find it
5 ambiguous, we -- the Debtors haven't even offered extrinsic
6 evidence to support their -- the intent. We have offered
7 extensive -- let me be clear. I want to be precise. They
8 offered one document, a financial statement from 2020. So
9 over a year prior to -- it covered the financial year 2020,
10 so a year prior to the migration. But the Debtors haven't
11 really offered any relevant extrinsic evidence. And we
12 think there's very compelling extrinsic evidence that shows
13 exactly what the parties were doing.

14 And Your Honor, as I said at the outset and I'll
15 repeat again here, we understand that we're asking you to do
16 something that is difficult because the customers are
17 standing up saying how can -- and Mr. Hershey did it right
18 at the outset -- I'm sure the Committee will tweet something
19 out tonight about what we've argued -- how can the preferred
20 equity try to jump in front of the creditors?

21 What we are saying, Your Honor, is the Bankruptcy
22 Code and bankruptcy law and New York law compels an outcome
23 here. That outcome is that the customers have claims
24 against LLC. They do not have them against other entities.
25 Whether or not the other intercompany relationships -- the

1 inter-creditor loan agreement -- whether or not that leads
2 to a recovery from -- for the preferred equity, that remains
3 to be seen.

4 But that is the structure that was actually in
5 place here, that there would be a customer-facing entity and
6 everything else would be covered by intercompany
7 relationships. And we believe that's what the law requires
8 here. As difficult as it may be for customers to hear that
9 they don't have claims against CNL, that's the outcome that
10 is compelled, Your Honor, by the plain language and the full
11 range of extrinsic evidence.

12 THE COURT: Okay.

13 MR. LEBLANC: Your Honor, thank you very much. I
14 know Your Honor is exhausted. Been here for a long time.
15 But thank you very much for the time and attention you've
16 given to this.

17 THE COURT: Thank you very much. I'm going to
18 take it under submission.

19 (Whereupon these proceedings were concluded at
20 2:12 PM)

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23
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25

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

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Mineola, NY 11501

Date: February 8, 2023

[& - 45]

Page 1

&	54:18 79:6	1795 2:7 104:3	91:15 92:3,5,6
& 3:3,10,17	12151 118:6	104:13	92:9 95:15
16:5 21:11	1221 3:19	1796 2:7	96:10 102:23
62:16 64:4	126 46:4	1797 2:7	103:3,11
82:4	127 35:17	1798 2:7	105:11
1	128 36:4,5,6	1799 2:7	27 104:3,4,5
	13 21:13,22	1953 2:7	2:12 117:20
1 19:10,12,14	22:1,5,7 34:23	1955 2:8	3
20:3,24 21:3,4	53:3 61:4,11	1960 2:8	3 20:2,11,25
21:4,7 22:1,5,7	61:12 78:17	1962 2:8	21:5 79:8
30:13 42:21	89:19,20,22,24	1965 2:8	30 20:25
44:17 53:2,6	91:9,14,16,17	1986 2:8 19:2	300 118:22
53:12,21 56:15	92:4,7	1991 2:8	31 19:23 20:4
68:16 72:18	13.3 59:19,24	1:59 1:17	21:3,4,5,8
78:17 83:2,19	77:14,17,21	2	66:17
99:18 109:12	78:2,6,8 90:2,7	2 20:2,11,25	318 45:23
1.1 35:22	90:14	21:5 72:19	46:14 47:14
10 19:10,12,14	13.3. 60:15	78:17 99:17	69:3,6
39:20,24,25	131 112:18	2.1 112:18,22	32 66:2,2,12
10,000 107:21	1338 2:6	20 59:5,8	33 66:19
100 54:23 79:7	1382 2:6	200 49:13	330 118:21
86:21	15 34:14,15	2020 116:8,9	341 99:19
10001 3:13	35:8 37:16,20	2023 1:16	369 46:16
10004 1:14	1552 2:6	118:25	371 46:20,21
10020 3:20	158 35:17	21 60:3	70:7
10022 3:6	54:23 79:8	22 45:11,13	393 46:14
105 107:12	112:18	46:3	4
106 55:20	1592 2:6	22-10964 1:3	4 20:3 21:7
11 78:17	15th 16:9	24 26:9 67:14	45:19
107:22	108:9	25 24:4,7,14,15	40 113:24
110 55:17,18	16 51:4,5,7,7	24:18,21 25:14	45 82:24 83:6
55:19	112:14	26:13,14 37:15	83:24 84:2,7
1126 46:14	1619 2:7	46:16 68:16	86:16 105:14
69:3,7 70:7	1631 2:7	70:8 72:24	113:25 114:10
11501 118:23	1729 2:7	78:18 87:25	114:11
12 21:20,24	1747 2:7	89:17,19,24	
34:13,23 54:16		90:13 91:8,15	

[5 - additional]

Page 2

5	7	absolved 37:17	acknowledges
5 30:14 42:21 44:17 45:4,20 45:22,24 47:11 48:12 49:7 56:24 83:2,20 109:13	7 20:3,11,25 21:5 23:24 57:1 73:8 86:19 105:11 105:12,15	38:6 41:22 43:16 44:12 67:23 79:3 110:6	27:20
50 86:20,22,22		absolves 37:7,9	acquired 76:15
55 3:12 82:21 83:4,20 84:3,6 85:24 86:13,17 105:13 113:22 114:2,4,5,15	8	absolving	act 109:2
	8 20:4 21:8 23:24 24:4 38:4 42:22,23 44:20 53:6 57:1 66:5 73:7 73:8 86:19 105:11,12,15 113:23 118:25	110:8	acting 39:2
6	850 46:6	absurd 32:10 98:10	action 107:19
6 1:16 20:3 21:7 23:22,23 32:11,12,13 38:4 42:22,23 43:6,13,14,21 44:19 45:3,22 45:24 47:11 49:8 54:22,23 57:1 66:8 73:5 73:7 81:1 82:22,25 83:6 83:13,21,25 84:2,4,10,15 84:20,23 86:18 86:19,20,21 87:22 88:2 99:20 104:7 105:11,12,15 113:23	9	accept 35:25 75:4 86:19 110:23,23 113:23 114:2	actionable 26:8
	9 30:2,2,6 38:24 40:23 62:24 78:17 100:7 109:4	accepted 114:9	actions 52:17
	a	account 2:4,5 44:8 56:22 71:9 77:7 79:11 81:2 82:21 86:20,21 87:22 113:22	activities 51:23 55:6 79:10
601 3:5	aaron 5:23	accountholder	actual 89:4
633 112:20	abigail 8:11	87:21	actually 18:21 19:3 21:20 30:10 32:4 33:20 46:20 48:13 53:17 60:2 61:1 66:14 68:20 71:24 72:1,25 84:19 87:4 88:4,7 90:16 99:4,14 101:20 104:14 105:21 107:17 112:1 114:9 115:3 117:4
	ability 26:10	accountholders	add 58:22 89:10 91:14
	able 67:4 91:2 112:6	16:19,22 68:7 78:24 79:15 82:7,16 83:4 83:21,22 87:15 87:16	added 57:20 69:13 70:14,15 73:7 88:2 94:14 109:17
	above 55:23	accounts 55:8 79:11	additional
	abreu 5:8	accurate 118:4	17:20 29:19 52:15 55:24 84:12
	absent 18:2	accused 48:15	
	absolutely 38:2 93:13	acknowledge	
	absolve 92:4 103:18 113:11 113:12	44:5 112:23	
		acknowledged	
		28:23 38:3	

[address - anne]

Page 3

address 16:20 33:2 42:10 59:18 77:13 81:19,20 85:20 97:23 101:11 101:18	57:18,19,20 58:6,7,8,15,17 58:23 59:1,12 68:8,11,14 69:13,20 70:2 71:4,12,14,19 71:19,21 72:2 72:14 73:10,18 73:20 74:21,22 80:9 83:15 84:11 87:24 88:17,22 92:19 92:19,19,25,25 93:19 94:10,18 95:15,17,24 96:1,9 102:5 102:20,21,22 103:1 115:22 115:22	75:4,6 78:1 79:12 83:13 84:13 90:8,9 90:17 91:13,18 91:20 92:3,8 96:3 105:10,18 agreed 20:2 22:13,20 26:17 56:18 82:25 92:6 98:9 100:11 agreeing 37:1 40:5 91:18 98:10 104:6 agreement 28:15 29:18,21 33:22 34:18 35:16,23 38:5 38:7 39:9 40:1 40:3,24 50:22 50:23 51:1,4,8 51:11,14 53:2 65:12,14 95:14 95:24 104:20 104:21,22,23 111:17,18,20 111:21 112:1,9 112:17 113:1,5 113:11,17 117:1 agreements 50:18 62:5 agrees 34:20 36:23 ahead 21:9 22:9 32:16 33:12 40:15	42:5 64:23 81:22 82:1 89:20 97:14,25 aizpuru 5:11 albino 9:11 alerted 16:24 16:24 alexander 10:20 12:18 ali 10:19 alifarag 9:12 alleged 25:13 25:25 allow 34:6 38:17 almeida 4:21 5:12 alter 80:3 ambiguity 115:20 116:1 ambiguous 65:2,10 93:15 116:5 amelia 8:6 amended 53:18 americas 3:19 amerson 9:13 amy 9:25 analysis 78:16 andrew 3:15 4:16 9:8,17 13:17 19:7,16 21:2 22:2,10 81:18 100:14 101:17 anne 9:7
adler 5:9 admission 19:9 20:4 admit 33:20 79:17 admitted 19:12 19:14 20:12,25 21:5,8 22:5,8 34:14 65:16 109:5 advance 95:2 aeronautical 102:2 afework 5:10 affect 80:21 affected 80:21 affecting 108:20 affiliate 24:24 30:3,16 37:14 40:23 47:7 59:13,15 70:16 71:6,13,24,24 71:25 73:6 74:3,17,18 89:25 93:3 96:19 115:24 affiliates 29:20 38:24 44:24,25 45:1,5,9 47:15 48:8 55:9 57:8	affirmative 64:7 affirmatively 111:2 afternoon 16:4 20:13 64:3 82:3 agenda 16:6 agent 70:20 agents 45:6 ago 28:19 82:6 agree 20:10,14 23:13,15,15,23 26:13 29:1,3 37:21 43:14,15 43:16 55:8 62:25 70:1 73:10,17 74:3		

annemarie 8:7	approach	87:22 89:21	55:7,11 61:4
answer 29:16	46:10	95:23 96:3,4	62:7 63:20
32:24 39:1	appropriate	97:13 98:22	67:4 69:18
40:14,16,16	37:1 40:8	101:22 105:1,1	77:7 79:10
80:24 99:1	64:18,21	107:23 109:19	82:7 89:12,12
108:15 114:17	araceli 8:13	111:24 115:21	89:14 91:3
114:19	archer 5:13	arguments	96:17 99:19,25
answering	arcos 12:13	27:18 30:9	100:8 107:10
106:11	argue 22:14,17	61:21 84:6,12	112:1,3,23,24
answers	22:17,19 24:3	arie 13:8	113:3,4,5,8
105:18 107:22	33:2 50:8	arising 64:14	assign 36:1
anubhav 13:14	59:22 81:3	artfully 77:20	66:21
anvar 13:2	83:16 86:15	article 35:22	assignee
anybody 29:17	95:3,13 103:7	artur 5:8	105:24
31:15 81:13	103:7	asked 43:13	assigning
103:10	argued 77:14	54:15,17 78:22	34:20
apologize 35:3	109:11 116:19	98:16 99:21,24	assignment
35:4 54:23	arguing 23:19	100:19,21	65:8,11,24
app 36:18	54:3 57:13	109:3 110:16	66:13
appealed 82:10	64:23 71:11	asking 38:23	assume 23:15
82:12,13	94:21 95:18	58:15,17,21,22	34:20 35:25
appear 17:9	96:5 98:19	91:13 101:4	39:3,4 86:19
appears 110:25	argument	103:14 116:15	110:2
111:1	20:16,20 24:8	assert 26:10	assumed 33:6
applicable	24:11,12 26:19	27:11 92:5	41:18 44:11
77:23	27:3,25 28:5	assertable 27:1	assuming 28:2
applicable	30:3,7 31:1	27:2 28:11	37:18
23:24 60:19,20	32:10,21 37:14	asserted 26:22	assure 62:8
61:1,16 77:22	42:19,19 44:21	28:3 42:25	attached 35:15
91:5 92:1	44:22 47:10	asset 35:16	attempt 16:11
applies 59:20	52:21 54:12,13	50:23 52:9	16:15
apply 76:5	58:23 59:19	79:14 99:22	attempts 17:5
appreciate	62:14 64:8	111:17 112:25	attention 16:13
103:25	67:13 70:1	assets 27:23	17:7,15,17
appreciates	71:12 73:8,13	36:2,5 47:5	117:15
110:16	75:4 80:6 83:5	50:24 51:12,13	attorneys 3:4
	83:24 84:9,13	51:20,22 52:6	3:11,18

[attributable - borrowed]

attributable 55:7 79:11 austin 15:4 available 84:6 92:2 100:2 avenue 3:5,19 avery 6:11 avino 9:14 avoid 59:17 108:6 aware 17:4,5,6 17:6,17,20 62:17 87:18	balances 36:20 44:8 balluku 9:15 bankrupt 91:1 bankruptcy 1:1,12,23 54:10 59:25 60:10,20 61:5 61:13 78:4,4,5 90:1,4,4,19,21 91:10,10,18 92:5 116:21,22 barbecue 72:7 72:9 barnes 5:14 basic 90:12 91:12 basically 67:23 78:1 basis 24:8 42:25 bates 112:20 bear 46:9 beaulac 9:16 becin 5:15 began 16:11 38:22 beganski 9:17 beginning 35:22 40:3 47:14 52:12 68:6 104:2 begins 46:21 behalf 19:8,17 21:11 22:11,15 34:19 35:18,19 65:25 82:4	belabor 58:14 believe 16:16 17:25 21:22 25:16 27:11,21 30:12 40:25 43:19 51:4 52:16,24 54:5 57:3 61:20 63:23 65:15 66:14 69:1 74:18 76:18 81:15 86:15 105:8,25 106:2 106:21 109:6 111:10,14,16 113:6 115:16 115:21,25,25 116:3 117:7 believed 52:18 56:8 107:17 bellamy 9:18 belong 82:18 112:24 ben 11:1 bench 18:12 25:10 29:14 beneficiary 61:19 benefit 27:14 30:24 63:11 berg 15:1 best 60:12 106:16 107:11 110:13 beth 7:13 better 21:23 108:24	beyond 63:21 big 89:9 billion 49:13 75:24 77:3 99:19,21 billions 62:9 63:4 110:24 bilter 9:19 binder 21:24 35:5,6 45:25 46:1 53:7 70:8 binders 18:13 18:14,16,18 35:3 binding 88:22 birch 5:16 biswas 9:20 bit 65:7 68:21 72:5 77:20 85:21 88:13 101:21 109:6 bitcoin 86:20 86:21 bitterly 108:1 bizarre 72:21 blank 77:19 blissfully 35:10 block 89:9 blowing 27:18 board 43:5 49:18 bolded 109:17 book 75:25 boroff 9:21 borrow 113:2 borrowed 48:14
---	---	--	--

[borrowing - celsius]

Page 6

borrowing 48:19 89:11 bottom 55:4 bound 69:4 bourgeois 5:17 bovenzi 9:22 bowling 1:13 box 43:14 44:1 44:2 55:23 67:20,21 81:6 86:18 114:9 bradley 6:18 breach 26:19 48:16 break 102:12 breaker 78:8 breuder 9:23 brian 5:14 7:15 7:17 11:15 12:3 14:9,14 brianna 9:19 brief 20:16 22:16 24:6 25:19 28:10 58:10 67:13 71:22 83:16 86:6 89:23 98:18 103:25 104:1,2 106:18 106:24 115:2,8 briefed 28:12 briefing 2:3 briefly 85:20 briefs 24:18 32:20 81:13 102:7 104:23 115:10	brier 4:6 5:18 bring 16:12 17:7 72:9,11 broad 87:11 90:20 92:1 bronge 5:19 brought 25:22 28:6 brown 4:8 5:20 bruh 5:21 bryan 7:6 buenviaje 9:24 burks 14:8 bury 72:24 business 36:19 43:15 48:9 63:21 110:7 buy 63:22 95:23 buys 31:15	carcamo 12:13 careful 100:16 107:6 carl 6:2 9:3 caroline 9:2 carolyn 10:1 carried 42:23 66:18 carries 66:17 carry 22:18 31:12 carved 72:14 carveout 96:20 case 1:3 3:17 16:8,17 21:11 25:25 33:21 54:3,5 62:16 76:3 82:4 86:5 86:7,8 98:21 99:2,4 115:5 cases 105:21 105:22 106:1 106:13 114:25 115:6 castor 9:25 catariana 12:25 categorical 99:3 cathy 7:9 14:11 cdpq 22:15 cede 19:4 celsius 1:7 16:5 23:10 25:7 30:6 36:18 40:4,7 43:8 44:6,6,7,14	47:6,13,15,21 47:23 48:9,11 48:14,15,16,21 48:24 50:17 55:6,9,18 56:2 56:8,20,21 57:17,18,19,21 58:8,8 59:10 60:25 61:1,3 63:2 65:5 66:21,25 67:2 68:5,8,8,11,11 68:13,13 69:9 69:12,16 70:2 70:24 71:2,4,8 71:16,18,18,20 71:25 72:17,18 72:20,23 73:1 73:1,20 75:2,7 76:6 77:25 78:13,18 79:9 80:2 83:14 84:22 87:5,23 88:16,17,22,25 88:25 89:1,3 89:10,12,13,15 91:1,4,6,8,25 92:2 93:3,5,5 93:14,16,19,23 93:25,25 94:1 94:2,4,5,6,11 94:18 95:9,14 95:20,24 96:6 96:7,8,9,13,13 96:18 97:4,4,6 97:6,8,8 99:13 99:18 101:23
	c c 3:1 7:24 11:22 16:1 91:25 93:24 95:20 96:8 118:1,1 cabin 29:12 calin 8:18 call 17:14,16 71:23 cameron 6:3 capital 58:24 91:25 95:20 96:8 capitol 93:24 capture 72:4		

[celsius - clear]

Page 7

101:23 102:5 102:20 107:8 109:8,18,20 113:7 certain 2:2 112:24,25 certainly 28:4 31:20 62:3 63:23 64:17 77:16 85:4 certified 118:3 cetera 45:6 chain 27:10 chairman 26:8 chamberlayne 10:1 chambers 16:24 17:21 53:7 chang 10:2 change 40:17 44:22 45:3 49:9,19 62:21 78:6 80:11 84:20 87:3 90:7,15 91:9 91:16,17 92:7 94:11 95:20 102:21 103:4 103:13,15,15 changed 47:11 76:2 109:9 changes 42:22 42:24 45:24 49:5 68:21 80:25 88:8,12 103:17	changing 43:6 103:21 chapman 10:3 charles 14:13 chart 59:9,11 89:5 93:18 109:6 chase 7:14 check 43:13 44:2 67:20,21 checkbox 98:8 98:12 checkboxes 98:2,7,11 checked 86:18 114:8 chen 10:4 choice 102:20 choose 93:20 93:21,23 chooses 94:20 chose 88:16 89:10,22 chris 3:8 5:15 16:4 20:22 64:4 christiansen 10:5 christina 10:7 christopher 4:4 5:22 6:16 10:17 chutchian 10:6 ciancarelli 10:7 circuit 114:16	circumstance 39:4 cirkel 10:8 cite 33:16 86:5 97:18 100:3 103:24 106:18 cited 86:6 99:2 105:21 claim 25:22 27:6 28:6,13 28:25 29:6 48:16,20,23 52:8,10,13,20 52:22,24 56:25 60:11,17,20,21 61:17,17 64:13 64:20 67:19 77:6 83:5 85:9 86:16,22,25 87:13 90:7,14 98:22 105:15 108:11 111:18 111:19,21,25 112:7,8 113:10 claimed 98:23 claiming 23:2 claims 2:5 24:5 24:9 25:5,6,15 26:11,21,25 27:13 28:2,10 28:11,16,21,22 29:4 31:9,12 31:19,22 32:1 32:1,3,4 41:4 49:13 52:18 62:9 64:12,12 64:14 68:12	70:4,6 71:9 73:10,18,22 74:4,23 75:3,5 75:14 82:17 84:21 85:2,23 85:25 86:1,14 91:8 93:6 95:18,25 97:21 106:21 107:1,3 107:7,14,17,18 107:20,21 108:3,6,8,22 108:24 110:24 114:15 116:23 117:9 claire 4:23 6:1 7:23 clarify 101:7 clause 87:23 95:3 clauses 70:25 clean 66:10 clear 19:11 24:11 25:10 26:24 27:12,16 27:19 28:1 31:2,11,16 37:15 49:18 56:11 57:5 60:9 62:16 63:25 70:19 71:13 76:4 100:25 106:5 107:7 109:23 110:19 111:6 111:18 116:7
---	--	--	--

[clearer - completely]

Page 8

<p>clearer 93:8</p> <p>clearly 38:8 48:4 67:21 95:10 104:19 105:1</p> <p>clerk 34:10</p> <p>click 81:6 106:2</p> <p>clicked 114:8</p> <p>clickthrough 105:13 110:23</p> <p>clickwrap 103:12</p> <p>clients 23:5 62:3,16,19,22 63:20 80:1 85:5</p> <p>closed 70:3</p> <p>cni 26:6</p> <p>cnl 23:3,14,14 24:5,9 25:14 26:2,8,11,12 26:24 27:10,13 28:1,6,16,21 29:4,13,18 30:6,16,19,20 31:2,3,3,6,20 31:20 32:1,14 32:22,25 33:8 34:19,21 35:18 36:1,25 37:3,8 37:9,16,18,24 38:1,5 39:2,17 40:9 41:3,4,8 41:15,20,20,22 41:24 42:2,11 42:15,20,20</p>	<p>43:16 44:12 47:17 50:13,22 51:13,19,23,23 52:5,10,10,20 56:25 57:2,10 59:16 62:8,10 67:22 68:3 69:1 73:8,17 73:17,18 74:6 75:18,20,24 76:8,20,21 77:1 78:23 79:14 80:10,21 81:1,4 82:25 83:2,3,5,19,22 83:25 84:1,17 84:23 85:9,10 85:25 86:14 87:1,1,3 91:16 92:4,7 99:25 102:21,23 103:1,18 104:6 105:6 109:23 110:2 111:12 112:2,3 113:12 113:14,15 114:16 117:9</p> <p>cnl's 26:18 84:7</p> <p>coco 5:22</p> <p>code 91:18 116:22</p> <p>cohen 41:12 42:9 110:17 111:8</p> <p>coin 60:8</p>	<p>coins 52:8,10 61:6 72:20 74:7,11,11 82:17,18 99:23</p> <p>coleman 10:9</p> <p>collectively 69:13 88:18</p> <p>colloquy 64:5 64:25 72:5 103:6</p> <p>colodny 5:23</p> <p>come 38:12 49:6 58:25 61:5 65:6 72:8 107:11</p> <p>comes 50:22 55:17 57:1 103:25</p> <p>comfort 63:5</p> <p>comment 67:11</p> <p>commented 100:18</p> <p>committed 25:12 26:7,8 26:12</p> <p>committee 3:18 16:24 17:6 20:10,14 21:12 22:7,19 31:23 33:2 54:3 77:14 82:5 108:21 116:18</p> <p>committee's 22:1,4 59:19</p>	<p>committees 114:14 115:9</p> <p>common 38:16 45:6</p> <p>communicate 92:25</p> <p>communicated 56:9 87:14</p> <p>communicati... 38:11 56:10</p> <p>communicati... 38:11,12 42:8 54:17,20 65:22 67:19</p> <p>companies 54:9</p> <p>company 27:2 30:13 32:8,10 39:3,5 50:14 56:7 57:24 62:19 63:10,12 63:20 69:17 74:24 76:7 80:7,8 109:22 111:16 113:7</p> <p>compelled 117:10</p> <p>compelling 116:12</p> <p>compels 116:22</p> <p>complained 108:1</p> <p>completely 87:19 96:21 97:8</p>
--	---	--	--

completion 55:5 79:8	consequences 76:10	continued 32:25 42:21	82:17
concede 28:25	conservatively 49:13	51:25	control 30:5
concept 62:11	consider 24:13	contract 20:18	49:4 55:7 59:3
80:17	75:11	22:23,24,25	61:24,25 62:1
conceptual 92:20,21	consistent 29:2	23:2,5,9 26:20	79:10
concern 101:5	49:6 54:7	27:12,21 37:12	controlling 81:13
concerned 41:5	55:13 56:6	37:12 38:10	controls 87:24
concerning 16:14	63:25 71:7	58:19 65:2,4,9	cook 10:10
conclude 27:22	107:19	65:21 77:23,23	cooper 10:11
100:4 109:15	consolidation 64:16	78:3,5 87:18	copies 34:2
concluded 117:19	constructed 61:18	90:5,6,14	copy 18:8,19
concludes 115:20	constructive 60:11 64:20	94:17 97:17,17	19:19 21:18
conclusion 50:6 52:15	construe 97:16	98:6 103:17	34:3,4 46:11
101:11	construed 97:19	105:9,17,24	46:12,19
condition 53:22	contains 86:9	114:24 115:12	cordry 5:25
conditions 35:23	contemplated 75:17	115:13,14,14	cornell 5:5 6:1
conducted 100:21	contemplation 90:19	115:17	corporate 27:4
conlon 5:24	contend 49:10	contracting 72:18 84:17	27:10 59:10
connection 55:25 60:7,24	113:21	87:3 103:21	80:18 93:17
91:6 113:2	contending 28:1	contracts 23:14 78:10	113:16
connects 111:15	contest 84:8	92:21 103:12	correct 19:1
conscious 102:19	context 24:13	106:3	23:1,7,15,16
consent 61:3	89:3	contractual 26:15 28:13	26:11 37:19
consenting 36:17	continue 16:25	37:11 39:5	47:22 51:6
	17:1 55:9 56:2	40:7,19 41:3	60:22 70:12
	56:3 75:24	41:14 48:19	82:22,23 83:18
	79:12,14 110:7	56:1 58:20	85:3 88:3
	110:18	63:5 67:12	corrected 53:25
		69:21,22 80:4	correctly 24:3
		86:25 93:3	cote 6:2
		109:24	counterparty 103:1
		contractually 27:5,22 30:8	country 118:21
			couple 42:7
			106:15

course 17:21	47:25 48:4,13	98:15 99:7	created 74:19
court 1:1,12	48:22 49:1,22	100:9,16 101:1	creates 95:16
16:2,17,18,19	50:1,3,8 51:2,5	101:6,14,16	creation 30:13
17:8,10,14,23	51:9 53:4,9	102:1,7,12,15	32:11
18:6,11,17,21	54:19,24 56:10	103:10 104:1,4	credible 54:1,2
18:24 19:3,11	56:15 59:7,18	104:9,12,14,25	creditor 31:10
19:20,24 20:1	59:22 60:15,19	105:20 106:4,7	60:12,16 61:1
20:5,9,21,24	61:5,8 62:1,24	106:11,13,23	61:14,16,17,18
21:4,9,16,20	63:7,17 64:2	107:12,24,25	85:1 90:3 91:4
21:23 22:4,9	64:22 65:13,17	108:12,16	91:7,25 107:7
22:22 23:1,8	66:4,7,9,11,16	110:1,4,20	117:1
23:12,18 24:2	66:20 67:9,18	111:5 112:11	creditor's
24:15,17,20,25	68:1,10,19,25	112:15,19,21	22:19
25:8,17,19,24	69:5,8,11,15	113:22 114:1,4	creditors 3:18
26:5,7,16,18	69:25 70:9,12	114:7,10,12,14	21:12 22:7
27:6,25 28:7,9	70:15 71:10	114:20,22,25	30:23 31:14,21
28:14 29:8	73:3,16,21	115:2,5 117:12	31:21 42:16
30:1,5,18 31:5	74:1,13,17,21	117:17	77:22 82:5
31:11,15,25	75:1,9,21	courtney 14:8	84:9 85:2,5,10
32:16,20 33:12	76:10,15,22	courtroom 4:1	108:21 109:1
33:18 34:1,3,9	77:2,8,13 78:1	courts 78:10	109:12 110:19
34:11,16 35:4	78:22 79:5,21	covenant 29:24	110:22 116:20
35:6,9,12,20	80:12,15,19,24	covenants	crews 6:3
36:6,10,15,22	81:12,17,20,25	29:23	critical 30:11
37:5,13,23	82:10,12,20,24	covered 113:4	30:11 52:16
38:13,25 39:7	83:8,11,16	113:5 116:9	58:14 103:22
39:10,12,22,24	84:5,13 85:1,7	117:6	110:15
40:9,12,15,22	85:22 86:17	craig 10:12	critically 111:7
41:1,7,17 42:5	87:6,21 89:16	13:12	crossed 47:19
42:10,17 43:12	89:20 90:12,23	crane 10:13	crusell 10:14
43:20,23,25	90:25 91:22	crazy 63:8	crux 24:10,12
44:3,10,24	92:3,10,12,23	create 29:4	crypto 100:8
45:2,4,9,12,15	93:7,12 94:13	54:4 60:16	cryptocurrency
45:18,21,25	94:21,23 95:6	61:12 67:2	2:5 16:20
46:2,5,9,12,17	95:11,22 96:10	78:3 86:16	cryptographic
46:23,25 47:2	96:14,23 97:1	102:24	112:24
47:9,16,18,22	97:10,13,22,25		

[curious - debtors]

Page 11

curious 48:13	30:24 31:9,24	d	dealt 22:6
current 54:12	32:9,22 33:7,9	d 8:16 11:14	50:16 60:6
curt 10:18	36:24 37:2,10	12:2,8 16:1	61:7
curtis 5:2 6:4	37:17,24 38:1	d'amico 8:24	dean 10:3
custody 72:19	38:3,6,11,11	daken 10:9	deanna 34:9
customer 24:5	38:12,18 39:6	dalhart 10:15	debate 102:3
24:9 27:13	39:18 40:6,6	damages 25:5	deborah 6:13
29:4 31:22	40:10,18,18,21	25:6	debt 55:10
32:9,15,19,23	41:2,9,14,21	daniel 6:14	79:12
32:24 33:4	42:12 43:7,8	11:3 12:2,17	debtor 1:9 2:4
36:19 37:21	43:10,10,13,17	danielle 4:13	3:4 31:23 70:6
39:14 41:18,23	44:16 48:10	9:1	84:11 85:23
41:24 42:2	49:12 50:15,25	data 44:8	97:20 107:6,9
44:15 48:14,15	51:21 52:8	56:22 107:18	107:13 108:22
50:13,15 51:19	53:13 55:11,15	108:9	108:23,25
51:24 52:6	56:9,11,23	date 23:25 40:8	debtor's 18:3
56:14 57:24	57:23,25 59:11	108:18 109:7	19:9,12,14
60:17 62:9	60:9 61:5 65:5	118:25	22:18 27:3
63:21 67:3	65:21,22 71:11	dated 113:1	36:14 42:18
69:22 70:4,6	71:14,16 72:20	dates 2:3	44:21,22 52:17
71:9 72:23	76:24 77:5,25	dave 12:15	53:14 64:22
73:9,10,14,17	78:13,19 79:4	david 4:25 5:9	82:7,18 87:13
73:18,21,22	79:24 80:5	6:11 8:21	89:5
74:3,10,11,22	82:8,25 83:13	10:15 12:13	debtors 2:2,6
75:3,5,13,18	84:11,21 85:23	13:23	16:5,10 17:6
75:19 76:23	85:25 86:3,13	davie 8:14	20:10 28:8
77:1,4 79:2	90:13 95:25	davies 10:16	32:7 33:2 49:3
84:1,23 88:15	98:4 104:6	day 25:25	52:16,24 53:15
95:17 97:20	106:20 107:14	111:12	53:16 54:5
99:22 103:8	107:17,20	de 8:22	58:15 59:10
105:3 110:5,24	109:24 110:2,8	dead 115:24	60:3 61:22
112:3,4,7	111:12 113:13	deadlines 2:3	64:4 86:1
117:5	113:15 116:16	deal 29:11 86:2	87:16 93:17
customers	116:23 117:8	105:22	97:19 99:16,24
23:21 25:7	cut 71:18,19	dealing 105:4	106:17 107:22
26:10 27:5,10		deals 25:4	108:3,6 114:14
30:15,15,17,22		29:14	115:9,21 116:5

<p>116:10 debts 80:13 decision 61:11 deck 33:25 34:13 43:22 60:3 declaration 35:15 defend 28:6 defense 98:23 98:24 define 47:15 102:20 defined 47:24 57:19 59:1 68:7 89:2,5 94:1 95:20 96:5 101:23 112:25 defines 25:2 68:13 defining 68:11 definition 47:13 57:20 58:8,22 59:13 definitively 33:6 deliberately 30:25 dell 10:18 demirtas 10:19 demonstrated 115:17 dennis 4:17 6:8 dentzel 10:20 depend 90:4</p>	<p>depending 55:24 deploy 51:23 deployed 112:5 deployment 52:1 deposit 52:8 deposited 2:5 61:6 desantis 10:17 described 42:4 100:6 describes 103:16 description 80:25 designed 38:10 determined 52:13 113:8 diaz 6:6 dibattista 10:21 dictates 22:25 dietrich 12:4 difference 81:8 different 58:9 58:18 67:14,15 69:23 81:10 86:22 95:2,4 98:16 102:10 102:18 103:11 109:9 differently 84:3 difficult 116:16 117:8</p>	<p>difiore 6:5 digital 61:3 89:11,12,14 91:3 diligence 62:16 62:19 diluted 31:22 31:25 32:2 dircks 10:22 directed 39:5 direction 39:9 40:1,3,24 97:17 directly 33:14 34:13 77:5 101:11 director 70:20 directors 45:6 directs 88:5 disagree 44:13 91:13,14 93:1 discharge 105:5 discharged 105:23 disclose 75:23 disclosed 62:18 discovery 33:21,23 99:24 discuss 85:15 discussed 17:24,25 20:15 22:12 98:13 discussing 64:14 discussion 103:6</p>	<p>disfavored 64:17 displace 59:23 dispute 23:4 disputed 30:12 31:1 48:7 disrespect 100:17 distinct 28:20 district 1:2 86:7 doc 2:6 docket 19:2 33:24 36:4,4 46:6,14 104:3 104:13 document 33:16 34:19 35:1,17,21 36:21 37:21,23 37:25 42:1 43:4 49:14,16 49:16,17 50:8 50:12 53:7 54:6,7 55:17 58:9 65:19 68:6,6,9 72:22 73:19 76:6,19 78:15,20 79:18 79:19,23,24 116:8 documented 63:18 documents 33:20 42:7 51:18 52:4 54:8 61:25</p>
---	---	--	--

62:2 65:8 67:7 79:1 80:2 99:25 100:1 doing 49:19 50:9 51:21,22 53:23 108:18 111:12 116:13 dollar 99:21 dollars 62:9 63:4 75:24 77:3 110:24 don 13:18 14:1 donald 13:6 doubt 88:20 dozen 70:17 draft 36:12 62:9 92:21 93:10 drafted 77:19 93:7 drafters 41:13 49:4 88:16,21 88:24 89:9 91:24 94:12,17 110:14 drafting 92:23 93:15 115:18 drafts 41:15 111:9 drew 10:24 droves 107:14 dua 10:23 duffy 6:7 10:24 dunne 4:17 6:8 dustin 9:21 dzaran 10:25	e e 1:21,21 3:1,1 10:14 16:1,1 118:1 eades 11:1 earlier 67:17 69:4 74:5 80:6 98:17 99:2 108:18 earn 72:19 78:10 81:1 82:8 earned 60:7 easier 88:10 easy 31:3 ecf 46:13 eckhardt 11:2 ecro 1:25 editing 16:16 eduardo 9:24 edward 5:16 7:10 effect 38:4 86:8 106:10,12 effective 35:24 59:2 92:6 105:9 effectuate 49:8 efforts 17:17 eggermann 11:3 ehrlar 11:4 either 23:3 41:20 97:17 elbit 86:6 elements 98:21	elimelech 6:9 eliminate 53:18 elizabeth 4:5 7:2 ellis 3:3 16:5 64:4 elvin 14:15 email 55:1,3 79:6 80:2 110:14 emails 56:16 emmanuel 9:11 emphasize 88:14 employee 47:7 70:19 employees 49:5 empty 67:3 engage 51:25 engaged 50:21 113:7 engaging 16:15 engel 6:10 engineer 101:25 102:1 102:13 enjoy 101:25 enormous 63:13 ensure 61:5 76:2 enter 19:6 37:24 51:1 115:12	entered 16:17 40:1 105:12,17 111:17 114:23 enterprise 84:22 93:17 enters 91:1 entire 32:11 43:8 59:9 61:2 61:4 71:8 72:15 113:20 entirely 53:13 54:11 55:13 57:2 71:7 entities 2:4 23:10 28:10 30:22 49:11 50:17 52:18,21 57:18,18 69:24 70:23 72:4,17 74:12 75:19 76:24 77:11,11 92:21 97:20 107:9,13 109:4 109:11,13 113:9 116:24 entitled 61:3 entity 26:6 27:4,23 30:14 30:15 32:9,15 32:17,18,19,23 32:24 33:5 39:15 41:18,24 42:24,24 43:1 43:7,9,9 44:15 44:16 47:6 48:11 49:10 50:15 51:25
---	--	--	--

[entity - exhibits]

Page 14

52:22,25 53:10 53:23 54:4 57:24,25 59:2 59:11 61:15 62:25 67:2 70:6 72:19 73:9,21 74:6,6 74:20 76:1,14 76:20 77:1,9 84:1,24,24 85:23 88:25 89:1,4 94:4 96:18 97:11 102:25 103:8 105:3 106:22 107:7,18 109:7 109:8,9 110:5 112:4 113:16 117:5 entry 37:10 equally 31:24 57:12 equals 71:24 102:5 equation 102:5 equations 102:7,15 equity 22:16 27:15 63:11 82:18 85:3,6 116:20 117:2 equivalent 79:13 erik 12:23 error 68:10,12 68:16,17 94:21 103:7	especially 81:9 81:9 essentially 51:13 establishing 2:2 estate 82:9 et 45:6 eu 88:25 evan 13:4 event 17:25 47:3 60:10 78:4 90:25 96:15 108:19 108:20,20 everybody 16:12 17:4,22 21:25 25:11 27:20 70:18 109:20 everyone's 17:7 evidence 18:4 19:13,15 20:12 21:1,6,8,15 22:5,8 29:2,16 32:12,21 43:4 49:25 50:1,7 50:20 52:15,23 56:5 58:3,5 61:23 63:25 65:1,16 75:11 85:13,17,18,20 87:4,12,12,13 87:18 88:6,9 97:24 100:3,10 100:11 106:17	106:18,20 110:13 116:2,6 116:11,12 117:11 evidences 36:21 evidencing 99:25 evidentiary 2:1 exactly 32:10 41:4 57:22,23 59:24 68:22 76:12 86:11 87:8 103:20,20 106:12 113:21 116:13 examine 88:5 examiner 100:5,10,18,21 101:10 examiner's 25:13 64:15,17 100:4 101:4 example 25:4 48:9 50:10 51:24 52:2 54:10,15 57:8 93:2,3 112:3 except 71:1 96:10,12 exception 20:11 exceptions 20:25 21:5 exclude 31:4 92:7	excluded 25:2 45:1 57:10 59:14,14 72:17 73:20 95:17 115:22 excludes 24:4 25:2 72:13 exclusion 20:19 57:21 58:16 61:2 72:13 exculpation 93:9 executed 50:23 execution 35:24 exhausted 117:14 exhibit 18:3,8 18:19,24 19:18 20:2,2,2,3 21:13 22:4 33:23 34:14,15 35:3,5,7,8,13 35:15 36:4 37:16,20 39:21 42:7 45:11,13 51:4,5,6,7 53:6 54:15,18 65:14 65:15 79:5 99:17,17,20 101:8,9 109:4 112:11,13 exhibits 18:1,3 18:22,24 19:6 19:10,12,14,21 20:11,16,24
---	--	--	--

[exhibits - financial]

Page 15

21:7,13,15,20 21:25 22:1,7 100:15 108:23 109:5 exist 83:24 84:14 92:19,22 existed 29:24 32:4 48:24 49:16 53:23 74:13,17 109:4 109:7,13 existence 32:11 65:19 existing 40:6 115:14 exists 58:18 89:3 109:8 expect 22:17 62:6 expected 103:10 experience 109:1 explain 49:7 91:14 explained 100:22 explanation 43:4 54:2 explicit 86:4,9 86:12 98:14 99:4,5 explicitly 86:8 exposed 57:25 exposure 29:12 express 83:2 87:17	expressed 104:19 expressly 34:19 57:9,11 57:16 84:1 95:21 extend 107:13 extensive 116:7 extensively 60:7 extent 17:19 27:9 28:24 52:11 61:16 65:1,9 84:16 87:14 93:15 97:16 115:19 extinguish 67:6 extinguished 79:22 extinguishes 104:22 extinguishing 67:15 extinguishm... 65:24 extra 18:7 extreme 64:16 82:16 extrinsic 49:24 50:1,6 58:3,4 61:23 65:1 75:11 85:13,17 85:18,20 87:11 88:6,9 97:24 106:17 116:2,5 116:11,12 117:11	ezra 8:24 f f 1:21 8:3 35:13 35:15 118:1 fabsik 11:5 face 57:4 58:3 58:4 faced 30:15 81:10 facing 32:9,15 32:19,23,24 33:5 39:15 41:18,24 44:15 50:15 51:24 57:24 63:21 69:22 73:9,21 75:18 76:23 77:1,4 79:2 84:1,24 103:8 105:3 106:8,9 110:5 112:4 117:5 fact 17:9 32:23 48:6,8 56:7 57:5,15 58:7 58:25 62:21 72:14 94:15,16 100:13 105:11 106:16 107:16 110:17 facts 64:17 111:8 factual 111:15 fahey 6:11 faith 4:24 6:17 falsely 16:18	familiar 58:12 family 43:8 107:8 109:20 113:16 far 54:2 108:19 faruk 9:6 favor 85:16 116:4 fca 39:5 41:8 41:20,21,22 42:1,1,4,9 49:8 55:2 56:16 67:19 79:6,7 109:22,22 110:18 fcl 40:24 february 1:16 118:25 fee 16:19,19,19 fell 49:14 femke 14:16 ferraro 99:21 fiduciary 39:2 fifteen 35:9 fifth 47:2 figure 31:18 file 16:10 17:6 108:6,12,13 filed 16:12 19:1 33:24 65:3 107:2,21 108:2,17 111:1 filing 107:14 final 104:5 financial 39:13 43:5 53:11,21 53:22 54:9
---	---	--	---

[financial - going]

Page 16

116:8,9 find 18:11 26:14 31:23 45:2,4,17,19 51:2 55:2 66:4 116:1,4 fine 23:12 45:21 46:9 54:24 65:17 81:20 finer 82:19 84:18 finish 32:16 first 25:4 66:19 68:24 69:2,6 71:1 72:13 85:14 86:22 88:6,15,15,16 89:6,10 90:17 92:14 93:15 98:3,8 99:15 fitting 45:9 flaherty 11:6 flannigan 11:7 flip 46:17 florence 11:7 flow 30:19 31:5 69:18 80:10 85:9 flows 27:10 70:1 84:22 85:3 fly 58:2,3 focus 73:3 focused 42:15 44:4	folks 17:3 follow 34:8 83:8 follows 104:17 forbidding 32:18 foregoing 46:22 47:3 71:3 96:15 118:3 form 38:12 formsma 6:12 forrest 6:12 forth 35:23 43:13 56:16 forward 46:15 53:17 82:25 83:6,13,25 84:3,10,15 found 78:10 four 19:21,22 24:7 frankel 6:13 frankly 61:22 fraud 25:12,15 26:7,8,8,11,12 26:13,18,20 28:2,6 31:25 64:12 fraudulent 64:20 free 31:11,16 friends 72:9,10 72:11 frishberg 6:14 front 19:21 107:24 116:20	full 117:10 fully 33:7 62:17 fundamental 58:20 funny 102:3 further 28:18 88:23 future 29:23 29:24	given 46:13 86:8 95:10 101:21 117:16 gk8 27:2 31:3,5 31:9,10 63:22 70:3,3 74:13 74:15 76:15 glenn 1:22 go 17:21 21:9 22:9 30:3 32:16 33:12 35:1,21 40:15 42:5 46:15 59:5 64:23 79:21 81:22 82:1 89:20,20 97:13,25 106:13,19 goal 62:7 goes 20:18 36:18 44:10 47:8 going 16:8,22 16:25 22:14 26:21 31:5,6 31:16,22 36:24 37:6 39:14,15 41:25 51:12 59:18 63:3 64:4,6 65:7 80:6,10 81:19 83:3 84:8,24 85:2 88:7,14 88:23 89:8 90:3 97:16 107:4 108:9 110:22,24
g			
g 5:16 16:1 gallagher 6:15 game 101:21 gastelu 6:16 gavryelle 15:5 gay 4:24 6:17 geary 11:9 general 59:23 90:18 generality 46:22 47:3 96:15 generally 23:23 generating 51:23 geoffrey 10:8 george 12:18 14:6 gerd 14:5 getting 61:8 giardiello 6:18 giorgio 9:22 give 21:23 39:22 45:7,16 58:15,17 100:2			

[going - hold]

Page 17

113:14 117:17 gold 11:11 goldstein 11:12 good 16:4 18:21 20:13 64:3 77:13 82:3 108:8 gordon 11:8 gorrepati 11:13 gosh 11:10 gotcha 78:14 governing 2:3 115:14 government 2:2 governs 90:18 grace 4:6 5:18 graciously 110:12 graham 14:17 grant 90:20 granted 105:16 graubert 11:14 great 34:5 greatest 100:9 greatly 63:11 green 1:13 greg 7:3 gregory 7:5 8:3 ground 85:20 group 72:6,14 guarantee 29:19 67:10 guaranteeing 62:10	guess 29:16 67:20 96:22 101:8 guiney 11:15 gundersen 11:16 guys 72:8 h h 14:1 hadley 3:10 half 90:22 98:4 hamlin 4:9 6:19 handed 66:7 67:16 68:18 69:4 88:8 handful 101:18 110:22 hanging 43:2 happen 86:15 87:5 happened 32:12 39:4 41:17 62:13 75:17 87:4 99:15 happening 84:19 happy 35:1 88:4 99:10 101:10 haqqani 11:17 harman 11:18 harmonious 78:11,12 92:17 94:19	harmoniously 78:18 harmony 72:16 hat 43:2 hatcher 11:19 hate 102:12 haver 24:9 head 26:2,3 99:1 headlong 109:21 heads 60:2 hear 25:9 117:8 heard 25:25 hearing 2:1,1 16:7,9,11,25 18:2,5 100:12 hearings 17:3 100:20 hearsay 100:10 100:23 101:1 heavy 85:18 hegi 11:20 held 38:22 74:7 100:8 helpful 18:8,20 henry 8:18 11:21 heras 8:22 hereof 35:24 herrmann 6:20 hershey 3:22 5:4 6:21 20:9 20:13,14 21:9 21:10,11,18,22 82:2,3,4,11,13	82:23 83:7,9 83:12,18 84:16 85:4,8 86:24 87:8 88:3 89:16,18 90:9 90:16,24 91:20 91:23 92:8,11 92:13 93:1,11 93:13 94:15,22 94:25 95:8,19 96:3,11,21,24 97:2,11,15,23 98:1,25 99:9 100:24 101:3,7 101:15,20 111:19 114:16 116:17 hershey's 109:25 hey 72:8 high 94:23 highlight 40:3 43:14 58:10 105:22 highlighted 115:3 hill 11:22 hirschi 109:15 history 32:6,6 hittelman 11:23 hoax 16:21 17:4 holcomb 6:22 hold 46:17 56:3 58:2 104:9
---	---	--	---

holders 2:5 3:11 19:8,18 22:11 29:11,18 34:15 35:5 51:7 53:6 81:2 82:21 85:6 113:23 holding 80:7,8 holds 92:18 hole 60:14 hon 1:22 honed 86:11 honor 16:4 17:19 18:15 19:2,7,8,16,19 19:23,25 20:3 20:8,13 21:2 21:10,13,19,22 22:2,10,12,22 23:7,16 24:10 24:19 25:16,20 25:21 26:24 27:8 28:5,9,18 28:22 29:1,8 29:22 30:8,21 31:9,17,20,22 32:5 33:11,16 33:19,23 34:5 34:12,25 35:2 35:8,14,16 36:3,11 37:4,9 37:20 38:21,22 39:8,11,19,25 40:11,25 41:10 41:12 42:3,13 42:15 43:19,21 44:2,13 45:7	45:11,22 46:7 46:10,15,19 47:10,14 48:2 48:18 49:20,24 50:2,5,9 51:3,6 51:10 52:14,23 53:1,3 54:1,14 54:14,15,16,18 54:20,21,22,25 55:13,16 56:5 56:13 57:5,15 58:2,5,11,12 58:19,24 59:4 59:5,6,8,16 60:1,6,6 61:6 61:10,11,20,22 62:13,17,21 63:1,9,19,24 64:1,3,12 66:8 66:10 67:11 68:15 70:7,23 74:6,15,25 75:6,15 76:12 76:25 77:16 78:7,9,25 79:16,25 80:19 81:7,16,18,23 81:23 82:3,6,6 82:11,14,23 83:7,12,18 84:5,17,18 85:12,14,24 86:11,25 87:9 87:10 88:3 89:18 90:9,17 90:18 91:21 92:8,22 93:1	93:13 94:8,20 95:8 96:4,12 96:21 97:16,16 97:23 98:2,3 98:25 99:9,11 99:13 100:13 100:24 101:13 101:15,17,18 102:2,8,14 103:5,5,19,24 104:16 105:7 106:1,9,14,15 107:4 108:7,14 109:3,10,14,16 109:19 110:3 110:10,15 111:8,14,22 112:13,17 113:6 114:3 115:7,16,20 116:14,21 117:10,13,14 honor's 78:16 96:24 hook 37:6 hope 45:19 host 34:10 huang 15:5 hudson 3:12 hugh 9:18 hundred 84:9 huong 12:7 hurley 11:24 hybrid 2:1 hyde 2:25 118:3,8	hypothetical 85:7 hypothetically 86:19 i i.e. 55:11 idea 112:10 identical 36:12 identify 88:24 89:1 identifying 94:4 ignore 94:9 ignored 94:17 iii 90:25 91:9 91:14 illustrates 30:11 59:6 66:1 106:16 imagine 26:21 92:23 immanuel 6:20 implication 110:19 importance 34:25 important 26:23 27:3,17 30:11 32:6 37:22 39:16 41:11 69:21,24 70:13 76:1 78:9,15,20 81:8 92:15 102:18 103:17 importantly 115:18,18
--	---	--	---

impossible 16:22	indirect 59:3	intended 26:14	internal 54:23
improvement 63:12	indirectly 80:21	26:14 51:17,18	internally 54:5
inclination 59:17	indiscernible 48:5 55:11	56:8 68:23,25	102:4
include 24:6	59:25 62:20	71:7 72:3 75:2	interpretation 23:20 58:21
44:24,25 47:15	66:17 76:11	75:7 76:6,19	95:2 101:22
59:2 94:18	81:6 90:24	76:23 79:1	105:10,18
112:23 113:4,4	92:2,11 93:22	102:24 103:8	107:8 115:15
included 58:7	93:23 94:5	113:20 115:23	116:1,3
73:5 79:7	95:1,12 97:5,7	intent 20:17	interpreted 90:13
113:10	97:18,18 98:5	27:12 29:4	interviews 100:20 101:2,4
includes 48:9	98:23 99:10,14	38:8 49:21,21	101:5
48:10 59:13	99:20 104:11	49:21,22,23,25	inure 27:14,14
77:23 83:15	108:1,16,22	50:3,5,13 52:4	inured 30:24
90:5 107:9	indistinguish... 44:18 59:15	69:1 71:15	invested 63:15
109:5 112:1	individual 31:10	87:5,13,14,17	86:23
including 47:6	influence 109:2	91:24 101:12	investigates 17:22
96:18	information 17:20	106:18 113:15	investing 52:2
income 51:23	initial 30:13	116:6	63:20
inconsistent 53:13 54:7,12	105:23	intention 88:21	investment 62:17,22 63:22
61:22	injunction 107:13	104:20	investments 74:7
incur 29:19	insisted 32:22	inter 117:1	investor 22:16
incurred 49:13	36:25	interact 43:7	47:7 70:19
111:11	insolvent 80:16	interacts 77:5	investors 63:17
indemnificat... 29:20 38:15,17	institutional 52:1 75:25	intercompany 28:22,25 29:5	96:19
indemnifying 62:11	112:5	32:3 50:18,21	invitation 72:12
independent 39:1	insulate 93:5,6	51:1,3,8 52:7	invite 72:7,11
indicating 93:24	intend 55:14	52:13 64:13	invoke 17:13
indicia 60:12	75:13 76:7,13	77:6 111:17,19	involve 92:21
	76:18 113:12	111:21,25	involved 17:12
		112:7,8,16	17:13 52:2
		113:10,17	
		116:25 117:6	
		intercreditor 51:11	
		interesting 115:7	

[iovine - koenig]

Page 20

iovine 6:23 ipo 53:17,25 irrelevant 87:19 isaac 12:6 ishmael 4:18 8:20 isolate 108:25 issue 2:4 22:22 25:9 28:9,10 28:21,23,25 29:6,15 31:13 31:17 35:1 42:10 45:13 64:10 77:14 86:11 98:18 103:2,11 105:22 107:2 108:10 112:7 issued 40:22 42:2 issues 23:22 27:20 28:20 55:3 77:10 109:2 issuing 30:6 iteration 48:2 48:7 57:9	janell 11:2 janko 6:24 jankovic 6:24 jaoude 5:3 6:25 jarno 15:1 jasleigh 11:9 jason 6:23 9:13 10:21 12:14 14:19 javier 13:25 jean 12:9 jeffrey 9:9 13:19 jennifer 8:17 jeremy 11:22 jesse 7:12 jessica 10:13 jimmy 8:12 job 100:19 johan 5:19 john 4:15 7:16 10:25 johnson 7:1 joined 22:16 105:14 joint 49:11 jointly 43:9 jon 11:19 jonathan 13:16 jones 4:5 7:2 jordan 34:6 jordyn 4:19 8:1 joseph 7:8 9:14 12:11	josh 4:3 joshua 7:19 judge 1:23 70:18,18 judson 4:8 5:20 julie 11:21 jump 116:20	kirkland 3:3 16:5 64:4 knauth 12:4 knew 89:2 know 16:13 17:2 19:5 20:15 24:6 25:24 29:25 31:18 33:24 37:6 38:13,14 38:14,16 48:6 48:14 58:5 59:23 62:2,4 64:15 67:6,20 70:17,18 71:2 71:10,22,23 72:13,25 73:16 80:1,24 81:21 87:6 89:23,25 89:25 90:2 92:1 98:23,25 99:15 100:16 103:12 109:7 109:16 110:11 110:15 111:18 115:16 117:14 knowledge 107:11 koenig 3:8 4:4 16:3,4,5 17:8 17:19,24 18:10 18:15,19,23 19:1,4 20:21 20:22,22 46:10 46:12,13 64:3 64:4,24 65:15 65:18 66:5,8
j		k	
j 5:9,17 11:11 12:17 14:4 jack 13:21 jacobs 11:25 james 4:7 6:10 7:21 8:10 12:18,21		k 12:15 13:15 kaczkowski 7:3 kaila 14:24 kaitlyn 11:23 kalin 12:1 kamara 8:20 kaplan 12:2 karen 5:25 karpuk 12:3 katherine 5:11 kathryn 11:16 kaufmann 15:2 keep 76:7 keith 5:1 7:22 9:5 12:19 ken 11:4 kenneth 13:9 kept 94:15,18 kevin 12:16 key 29:15 keyan 14:12 khair 13:10 khosravi 4:10 7:4 kieser 7:5 kind 102:1,14	

[koenig - leblanc]

Page 21

66:10,11,13,18 66:21 67:2,11 67:25 68:2,15 68:20 69:2,6,9 69:12,16 70:5 70:10,13,22 71:15 73:12,19 73:24 74:5,15 74:18,24 75:6 75:15,22 76:12 76:17,25 77:4 77:9,16 78:7 78:25 79:16,22 80:14 81:7,15 81:23 88:8,13 92:15 93:2 101:24 107:5 110:12 kokster 12:5 kotliar 7:6 kroll 85:3 ks 1:25 kwasteniet 4:11 7:7 106:15 108:5 kyle 7:18	75:2 76:2,4,8 81:4 83:3 88:17,18 109:15 117:10 larrabee 12:8 las 8:22 late 81:22 latreille 12:9 lau 7:9 law 38:16 60:19,20 61:1 61:13,16 77:22 77:23,23,23 78:5,5 81:13 86:5 87:19 88:5 90:4,4,5 90:10,11 91:10 92:1 97:18 98:15,15,16,21 98:22 99:8 103:22,23,23 103:24 104:7 104:18,24 106:12 114:16 114:19,21 116:22,22 117:7 lawrence 7:24 11:5 laws 91:5 lawyer 63:7 64:22 71:23 92:23 101:25 107:23 lawyer's 35:15 lawyers 62:18 77:18	layla 7:20 layne 12:10 lazar 7:10 100:19 leading 50:12 leads 52:14 87:12 117:1 leah 4:9 6:19 leave 56:12 72:1,1 leaves 90:6 leblanc 3:15 4:16 19:7,7,16 19:17,22,25 20:6 21:2,3 22:2,2,9,10,11 23:7,16,19 24:10,16,19,23 25:1,16,18,20 26:3,6,12,17 26:23 27:8 28:4,8,17 29:9 29:22 30:4,8 30:21 31:8,13 31:20 32:2,17 33:11,13,19 34:2,5,12,17 35:5,8,10,14 35:21 36:8,11 36:16 37:4,9 37:20 38:7,21 39:1,8,11,19 39:23,25 40:11 40:14,16,25 41:2,10,19 42:3,6,13,18 43:19,21,24	44:1,4,13,25 45:3,7,11,13 45:16,19,22 46:1,3,7,19,24 47:1,17,20,23 48:1,5,18,23 49:2,24 50:2,5 50:9 51:3,6,10 53:5,10 54:20 54:25 56:13,17 59:8,21 60:1 60:16,22 61:10 62:13 63:1,9 63:19 64:2,5 64:14,25 65:7 65:20 67:7,25 68:20 70:1,24 71:10,22 73:4 73:13 75:25 78:2,22 79:5 79:17 80:1 81:3,18,18 85:14 86:12 88:1 92:6 95:6 98:2,13 100:13 100:14 101:16 101:17,18 102:2,8,13,14 102:17 103:19 104:2,5,11,13 104:16 105:7 105:25 106:5,8 106:14,25 108:7,13,17 110:3,10,21 111:6 112:13 112:16,20,22
l			
l 6:12 13:6,9 laboring 22:18 lafayette 10:10 laid 65:2 laila 7:8 lam 12:7 language 24:13 27:12 37:2 42:19 58:25 62:10 74:9			

[leblanc - little]

Page 22

113:24 114:2,5 114:8,11,13,19 114:21,23 115:1,4,7 117:13 leblanc's 67:18 71:12 79:25 85:5 97:3 lectern 19:4 ledanski 2:25 118:3,8 left 34:24 57:21,22 102:23 legal 2:4 28:10 60:24 75:19 76:1,20 91:5 118:20 lender 113:2 lenders 112:24 lending 48:9 48:10,15,15,17 48:21 74:17,18 77:9 89:11 109:8,18,20 leon 34:18 35:18 leonenko 7:11 letter 115:24 letters 65:20 89:9 108:22 lexington 3:5 lhrfeld 12:11 liabilities 25:7 34:22 36:2,5 39:3 44:16,19 49:14 50:25	58:17 62:8 63:14 65:25 69:23 79:3,22 102:6 111:3,4 111:12 113:3,9 113:12 liability 23:14 24:5,9 25:3,14 26:18,19 27:22 29:12,19 32:22 32:25 33:9,9 37:3,8,10,17 38:6,8 40:10 41:3,9,23 42:2 42:11 43:16,17 44:12,18,22 45:1 49:10,10 49:11 53:13,19 54:4 55:15 56:3 57:10,14 57:17,25 63:4 67:6,15,23,23 70:10 71:17 72:18 73:6 78:24 84:7 86:10 92:4,7 93:9 95:16,17 97:20 102:24 103:18 104:6 105:5,24 110:2 110:6,8,18,20 110:21 liable 22:23 23:11 27:5 28:2,16 30:14 30:16 32:9 36:24 37:1,7	37:19 38:1,1 38:18,19,19 39:15,18 41:21 42:24,25 43:1 43:8,10 45:5 48:8 50:15 59:11,12 62:25 67:1 69:1 70:4 70:6,20,24 71:11,12,14,16 73:9,18,22 74:3,22 75:2,5 75:8,8,13 76:2 76:7,8,14,16 76:17,20,24 78:5,13 79:15 80:12,17 81:1 81:5 83:1,2,3 83:19 84:11 92:25 103:9 107:8 109:11 lie 68:12 light 17:9 34:25 111:24 lily 14:21 limit 25:14 26:9,10,14,16 59:16 68:12 limitation 44:17,19,21 47:6 58:16 70:10 73:6 93:9 95:16 96:18 102:6 limitations 25:6 109:22	limited 42:19 44:7 47:21 55:6 56:3,21 63:3 69:10,17 79:9 91:8 limiting 46:21 47:2 96:14 limits 23:14 26:19 57:17 linda 8:8 lindsay 12:12 line 45:9 47:2 lines 24:7 liquidation 91:1 list 16:20 18:4 18:8,20,25 19:18 21:14,18 21:23 33:23 42:7 99:17,20 101:9 listen 17:3 listening 79:16 listening's 16:13 listing 108:2 lists 21:24 36:19 literally 58:13 litigation 16:7 29:15 108:14 littered 68:5 little 65:7 68:21 72:5 77:19 85:19,21 88:13 101:21 109:6
--	---	--	---

[lived - manus]

Page 23

lived 56:23 llc 1:7 26:3 27:23 32:24 33:5,6 34:19 34:20 35:19,25 37:1,11,17,24 37:25 38:5,17 40:7,19 41:15 41:18,20,25 43:18 44:6,7 44:11 50:13,22 51:1,12,19 52:5,8,9,9 56:8 56:19,21 57:19 57:21 60:21 67:2,24 68:3,8 69:12 71:11,16 71:18,20,23,24 72:1 73:2 74:11 75:18,20 76:8,21 77:7 78:5 79:2 83:14 84:24 88:17,22 90:7 90:14 91:9,17 93:19,23,25 95:17 96:1,6,7 96:9 97:6,8 100:1 101:23 102:5,20,23 103:4 105:3 107:21 112:6 116:24 llewellyn 12:6 llp 3:3,10,17 loan 52:1 74:13 74:20 75:25	89:12 112:5,17 113:17 117:1 loans 74:8 77:10 long 20:19 24:7 24:22 37:15 72:25 90:1 96:2 117:14 longer 32:14 32:22 33:8 37:19 38:1,19 39:14,18 40:10 41:9,21 51:24 66:25 67:22 77:1,4,5 81:1,5 83:3 85:25 look 16:25 17:1 22:24 36:3,12 39:11,19,21 47:13,14 50:6 51:9 54:21,22 55:20 58:11 66:2,14 68:17 69:2 78:3,16 88:14 93:14 95:12 98:20 100:6 108:25 looked 24:20 75:12 81:12 109:15 110:11 111:21 looking 28:12 41:11 53:9 56:20 74:25 75:9 91:24 104:9 112:17	loren 11:18 los 12:13 lot 17:2 18:7 23:4 24:15,16 54:9 61:8 62:1 63:9,20 64:5 75:10 94:6 loud 108:1 lu 12:14 lucas 5:2 6:4 6:22 luck 62:25 luis 6:6 luke 13:11 lunch 7:12 m m 7:7 8:15 12:16 15:2 machinsky 25:12 26:1,1 26:22,24 27:1 34:18 35:18 63:10 made 41:18 42:22,23 47:10 49:5 61:22 62:6,22 69:19 74:7,7,20 83:2 87:16 89:21 92:14,16 94:4 97:8 101:21 102:19,21 103:4 107:1 111:24 main 16:6 17:25 55:6 79:9	maintenance 84:20 85:10 make 17:3,5,14 18:6 19:11 21:16 25:10 28:15,19 32:5 34:7 41:22 49:19 63:12 64:18 67:13 70:19,23 71:5 71:11,13,15 75:13 76:1,7 76:19,23 87:10 88:10,21 93:4 93:21,22,23 94:6 95:9 96:4 99:12 101:22 107:4 108:24 111:16 113:13 113:17 makes 55:16 60:9 88:4 92:8 102:11 105:2 making 27:19 33:15 62:14,17 73:13 84:6 103:4 malek 4:10 7:4 malhotra 12:15 manage 51:13 manager 63:2 63:10 manifested 104:20 manus 12:16
---	---	--	--

[marc - minus]

Page 24

marc 13:22	mcgarry 7:17	meant 73:1	migrating
maree 12:17	mckuhen 7:18	80:20 94:3	41:14 111:3
maria 10:6	mcnamara	meeting 99:19	migration 40:2
mark 5:21 8:9	12:21,22	melanie 4:20	40:6,8 42:6
12:8,12	mean 26:25	9:4	49:8 51:19
maronpot 7:13	27:1 38:8,18	member 47:7	55:5,18,20,21
marsh 7:14	41:23 56:12	49:18	55:24 62:22
marshall 17:11	59:22 60:22	members	73:14,16,25
17:12	62:2,3 65:24	70:19 96:19	74:2,14,16,19
marshalls	67:1,1 69:16	mendelson	74:22 75:3,14
17:22	71:10 72:2,3	12:23	76:20 77:1,6
martin 1:22	72:25 74:2	mentioned	78:23 79:9
masumoto	75:9 78:18	52:12 92:18	80:7 87:3
7:15	79:3 80:16,17	115:8	99:13,25
material	82:24 89:21	mentions 98:2	101:12 109:6
103:15	91:7 93:1,25	mer 9:6	109:13 110:25
materially	94:9 95:1,21	mere 81:8	111:25 112:4
53:21	95:22 96:7,13	mester 4:3	113:8 114:6
math 71:23	97:8 102:9	7:19 22:15	116:10
101:25,25	103:19 110:3	62:20	milbank 3:10
matt 12:22	110:10 113:24	metaphor 72:6	19:8,17 22:11
matter 1:5	113:24	mg 1:3	milin 13:7
16:14 85:15	meaning 57:22	mia 10:11	milligan 7:20
matters 65:1,9	58:18,18 89:6	michael 5:3,24	mine 61:6,9
matthew 11:11	93:18,20 94:11	6:25 11:14	mineola 118:23
12:20	95:10 97:5	middle 24:3,6	mining 27:2,7
matthews	meaningful	24:21 37:15	27:9 31:3,13
12:18	107:10	44:1 45:10	31:14,15,19
maximum	meaningless	58:16 72:24	48:11,24 52:2
97:20	72:15	90:1 96:2	52:22,25 53:2
mccarrick 4:15	means 29:5	migrate 50:13	53:6,10,18,23
7:16	52:21 58:23	52:5 110:4	63:22 70:2
mccloy 3:10	67:5 73:8 81:4	migrated 27:24	74:24 75:2,4,7
mccormack	93:19 94:2	55:8 56:7	75:13 76:7,11
12:19	96:6,8 97:6	69:23 74:11	85:1,2,5 109:7
mcdermott	109:20	75:21,22 79:12	minus 71:24,25
12:20			

[minute - ny]

Page 25

minute 87:2	nathan 14:2,22	83:22,25,25	notice 16:11
minutes 16:10	nathaniel	84:1 86:3,3	17:7 60:9
mira 11:17	12:10	87:4 93:10	66:24
misleading	need 18:17	99:14	notification
53:21	52:11 55:25	nevertheless	40:18,18
misrepresent...	57:7 92:14,16	101:2	notify 40:5
26:20	98:6 105:8,9	new 1:2,14 3:6	notwithstanding...
missed 94:17	106:19 107:12	3:13,20 37:11	58:7 71:3
98:20	107:12	37:11 67:2	novation 33:3
misstatements	needle 78:2	73:7 74:19	33:10,18,22
25:25	needs 98:14	81:13 84:23,25	34:17 36:12
mistake 95:3,7	negate 72:10	86:4,7 87:19	37:3 42:11
96:5 101:21	negisa 9:15	88:17,18 89:9	65:11,12,13,19
mittell 11:24	negligent 26:20	98:9,15,21	67:5,15 81:9
mitrakas 12:24	negotiated	104:8 106:11	81:14 83:17,20
modify 16:18	62:5	114:23 115:13	84:14 98:15,18
90:10 98:11	negotiators	116:22	98:19,22,23
moment 28:19	62:4	news 102:12	99:6 103:22,24
38:22 99:10	neither 24:17	nifty 89:21	104:8,18,24
month 82:6	29:18	night 65:3	106:10 109:4
morgan 14:18	nelly 4:21 5:12	81:12	114:21,22
motion 2:2	network 1:7	nikhil 8:19	november
22:21	44:7 47:21	nima 4:10 7:4	108:9
moura 12:25	68:8 69:10,12	noah 8:15 14:3	noyes 5:1 7:22
move 18:3 78:2	69:16 71:16,18	non 55:9 60:20	number 16:21
89:17	71:20 73:2	78:4 90:4,4	19:2 46:6 55:4
moved 51:20	79:9 83:14	91:10 107:13	66:19 102:9,18
51:22 52:6	88:17,22 93:25	normally 22:20	104:3 112:20
75:18 109:16	94:3,6 96:9,13	note 69:21 85:4	numbered
mulligan 13:1	97:6,8 99:18	91:23	18:13,14
multiple 74:12	networks 40:7	noted 20:1	numbers 66:6
n	44:6,7 55:6	55:23	nurullayev
n 3:1 9:3 16:1	56:2,21,21	noteholder	13:2
118:1	63:3	20:24 21:7	ny 1:14 3:6,13
nash 7:21	never 29:3	noteholders	3:20 118:23
108:4	39:2 49:3,20	20:11 23:2,13	
	63:7 65:12	95:13	

[o - outset]

Page 26

o	105:2,4 113:9	44:1 45:12,18	operated 32:10
o 1:21 16:1	obligor 71:9	46:5,13,17,24	44:14 50:14,16
118:1	105:23	47:18,25 48:22	105:12
o'brien 4:23	observe 88:18	49:1 53:4,10	operation
7:23	obviously	54:24 59:7	63:22 112:17
oar 22:18	16:21 17:15	66:9,11,16	operations
oath 100:22	42:15 44:14	67:24 69:5,8	52:3
101:2	67:21	75:1 77:8,13	operator 63:2
objection 18:2	occur 99:3	81:20,23,25	opinion 78:10
19:9 20:7,20	occurred 62:23	82:1 83:3,23	opinions 29:15
20:21,23 21:14	occurs 66:25	84:17 91:22	102:16
22:3	ochnser 13:4	92:10 96:23	opposed 87:24
objections 18:1	octave 5:17	97:2,10,13,15	opposite 96:8
20:1 21:25	odd 45:10	97:22 100:16	option 94:9
obligate 69:24	offer 20:2	101:7,15,16	options 95:5
obligated	21:15 102:17	104:1,4,15,16	order 16:17
42:20,21 67:24	offered 29:17	105:4 106:7	17:10 31:16
72:21 84:2	49:4,23 116:5	112:15,16	104:15
113:14	116:6,8,11	114:10,12,22	ordered 16:18
obligation 38:9	offering 19:18	117:12	orders 16:17
68:3,4 72:23	19:25 20:3	old 104:21,22	ordinarily
obligations	office 34:7	118:21	17:11 103:15
23:3 27:23	officer 70:20	oleksandr 7:11	org 59:11 89:5
33:7 34:21,21	officers 45:5	omnibus 16:7	93:18 109:6
36:16 37:18	offshoot 76:8	16:9	organizational
40:20 41:19	oh 18:13 45:15	once 49:12	59:9
44:8,11 47:5	63:8 74:2 97:2	56:25 88:11	originally
50:25 51:20	99:4	ones 46:8	47:21
56:7,18,19,22	okay 17:18	oona 10:14	orren 4:14
60:25 61:13	19:4,24 21:4,9	open 46:14	13:5
65:5 66:23	21:25 22:5	opened 21:24	osborne 13:3
67:3,10,14	23:18 26:5	opening 68:13	outcome 91:9
68:5 69:18	34:5,11 35:4,9	87:23 104:2	116:22,23
72:20 73:1,2	35:12 36:6,6	115:8	117:9
77:25 78:19	36:10,15,24	opens 87:22	outset 116:14
80:9 81:2,4	39:22,24 40:12	operate 51:13	116:18
91:2,6 96:17	42:5 43:23		

outside 72:4 outstanding 18:1 overnight 60:4 overview 87:11 owe 27:9 owed 31:21 owes 65:5 72:23 77:6,25 78:19 own 30:23 31:21 52:17 owned 69:18 ownership 60:11,12 91:3 owns 80:8	pages 45:20 46:4 104:17 pandey 7:25 paper 18:7 23:4 41:8 50:4 paperny 4:19 8:1 34:6 papers 33:17 65:3 paragraph 24:22 47:1 51:9 66:2,12 67:14 79:8 87:24,25 88:23 89:14,17,19,22 89:24,24 90:1 90:7,13,14 91:8 92:5,6 93:8 96:2 103:2,11 paragraphs 89:8 109:17 paramount 115:19 pardon 18:23 64:24 parent 26:6 80:12,17 parpart 8:2 part 17:10 28:4 28:23 40:2 44:19 52:11 55:18 58:24 65:22 72:12,13 73:13,14 74:19 89:15 105:14 108:23 110:12	112:6,8 particular 23:21 30:10 51:15 63:21 112:18 particularly 111:23 parties 17:2,24 17:25 19:5 20:8,16 22:13 23:22 25:2,5 30:12 38:9 52:5 87:16 92:20 104:19 112:23 113:3,7 114:23 115:1 116:13 party 20:18 23:5,6 30:23 43:17 66:23 86:10 87:17 93:4,6 103:5 103:20,21 115:12,13 pass 17:21 62:3 passed 52:9 patel 13:7 15:3 patrick 7:21 paul 9:23 11:5 14:7 pavon 41:12 42:9 55:1,4 79:6 110:17 111:8 pay 16:19 pdf 16:16	peled 13:8 people 34:7 61:8 63:10 72:6,10,12,14 79:6,7 105:12 111:9 percent 82:21 82:24 83:4,6 83:20,24 84:2 84:3,7,8,9 85:24 86:13,18 105:13,14 113:22,25 114:5,10,11,15 percolating 108:10 perfect 93:4 105:2 perfectly 36:25 perkins 13:9 person 47:5 49:15 58:13 96:17 perspective 79:19 persuasive 79:18 pesce 8:3 peter 14:4 petition 23:25 100:8 pham 13:10 philippe 11:20 12:9 phillips 8:4 phishing 16:11 16:15 17:5
<p>p</p> <p>p 3:1,1 6:21 8:2 10:25 11:15 16:1 page 35:17 36:3,4,8,9 39:20,24,25 45:23 46:1,14 46:15,20,21 53:3 54:22,23 54:23 55:17,18 55:19,20 58:4 66:15,16,17,18 66:19 68:24 69:3,3,5,6,6 70:7 71:21 72:3 79:7 80:3 81:5 89:8 104:2,4,16,17 105:21 109:18 112:18</p>			

phrased 59:24	38:21 39:10	posed 64:7	presented
picked 108:18	42:14 44:11	position 52:19	23:20 49:15
piece 41:8 50:4	47:9 48:1 49:2	53:14 55:14	presumably
100:3 110:13	55:17 57:15	56:6 57:22,23	49:12
pillay 8:5	58:14 59:6	61:24 70:5,21	pretty 45:6
place 24:6	62:5 69:19,20	85:11,16 96:24	previously
50:22 57:1	70:22 75:7,7	97:1,3 107:6	57:23 84:17,21
117:5	76:5 77:6	positive 72:12	88:19 94:1
placeholders	80:16 81:13	possible 92:1	primarily
19:23	84:5,18 87:10	possibly 67:4	22:14 37:7
places 58:9	90:12 91:12	71:6	principles
plain 42:19	92:15 99:12	post 86:21	58:20
117:10	100:25 101:11	100:8	printed 89:24
plan 40:2 55:5	101:24 102:19	potential 29:12	prior 33:21
55:18,20,22,24	105:7 106:1,16	poynter 13:6	37:12 42:14
78:23 79:9	107:1,4 108:8	pre 73:5 74:21	48:2,7,11
110:25	109:10 110:14	82:22 83:21	54:10 66:24
planet 58:13	111:15 114:14	84:4 86:18,20	73:4 74:10
platform 2:6	pointed 64:13	100:8 109:5,13	88:2 94:2
89:11 109:19	65:8,18 67:7	115:14	102:22 109:12
109:20	73:4 75:10	precise 67:22	112:3 114:5
play 63:15	79:5,7,19	116:7	116:9,10
pleadings 42:8	86:12 88:1	preclude 25:5	probably 20:18
please 16:2	pointing 51:14	predominantly	58:12 64:6
17:4,5,16 55:2	66:12 80:1	99:22	88:4 110:13
97:25	points 75:19	preferred 3:11	problem 17:16
plenty 29:13	88:10 92:13	19:8,17 20:23	43:3 104:25
plural 88:19	98:3 101:19	22:11,14,15	109:21
plus 71:23	106:15 109:14	27:14 29:11,17	proceed 89:19
102:5	114:16	34:15 35:6	proceeding
pm 1:17	pollard 8:6	51:7 53:6 62:5	28:23
117:20	porcari 13:11	62:8 116:19	proceedings
podium 85:15	porter 7:24	117:2	117:19 118:4
point 20:10	portfolio 52:1	present 4:1 5:7	proceeds 31:12
22:24 23:12	portion 95:15	86:10 102:9	31:17
28:19 30:11,11	95:15	presentation	process 108:10
32:5 33:15		65:3 100:4	

[produce - rebuttal]

Page 29

produce 99:24	67:1 70:23	31:6 32:25	43:25 56:15,15
production	71:16 72:25	34:13 36:22	57:4 58:5
36:14	78:12,14,15,20	38:23 40:17	72:16 78:10,18
program 74:20	78:20	49:2 54:16	79:1 90:21
82:8	provisions 23:3	61:20 85:22	92:16 93:14
progress 55:24	38:15 58:6	97:3 98:17	95:19 98:9
prohibited	77:18 78:12	99:7 100:19,24	100:7 105:21
42:2	111:22	101:3 105:19	106:13,23
prohibits 62:10	publicly 100:2	106:11 107:23	114:25 115:2,5
promise 86:10	punitive 25:5	110:17 115:11	115:6
promptly	purchased	questions 64:6	reading 89:25
17:15	74:15	82:1 109:3	90:25 92:18
proof 49:23	purely 92:20	111:1	94:19,20
proofs 108:6	purportedly	quick 100:25	reads 73:20
property 82:8	99:14	quickly 101:19	real 52:24
82:9	purpose 32:13	quite 25:13	realize 88:8
proposition	61:2,4,12 71:8	96:8 102:4	realized 87:25
86:6 87:20	71:11 74:9	quo 84:20	really 19:23
protect 97:20	purposes 18:2	quote 60:13	23:21 25:17
proved 28:3	67:25 95:13,23	89:23	71:5 73:1 74:2
proves 49:25	96:10,12	r	75:10,12 77:14
provide 16:8	100:11	r 1:21 3:1 12:6	78:2,22 83:11
67:10 84:10	pursuant 61:13	16:1 118:1	90:2 96:6
88:20 97:19	pursued 64:19	raffaele 13:24	102:19 103:10
105:10	put 23:12	raised 55:3	108:9 115:24
provided 30:22	24:17 34:3	98:18	116:11
44:6 55:19	43:13 56:11	rakesh 15:3	reason 30:25
provides 86:5	60:2 71:13	range 117:11	32:5 37:10
88:19 90:11	82:18 84:18	rasile 13:12	44:14 49:20
providing	88:16 104:14	rather 82:9	63:14 80:11,11
66:24 87:1	109:22	101:13,14	reasonable
provision	puts 60:9	rational 39:2	115:25 116:1,4
22:25 44:18,22	putting 37:13	43:3 63:2	reasons 80:22
47:12 51:15	q	reach 16:23	90:17 103:14
57:16 58:17,19	question 22:23	reaches 101:11	rebecca 6:15
60:13 61:2,4	22:24 23:8,9	read 23:4	rebuttal 101:9
63:6 66:13	25:20 28:20	27:21 38:14	

[recall - report]

Page 30

recall 85:14	references 65:4	56:19 57:2	remained
receive 42:11	68:9 72:22	69:21,22 73:14	112:2
received 21:14	77:24 81:10	73:17 74:10	remaining
recent 16:11	referred	75:18 79:2,13	55:25 56:1,4
recital 34:24	101:24	79:24 80:4	remains 75:24
recognize 27:3	referring 65:20	93:4	117:2
113:20	refers 53:5	relationships	remarkable
recognized	61:11 77:23	48:10 50:17	53:16,19
85:24 98:4	95:14 100:20	109:24 116:25	remedies 60:24
103:6	reflect 52:4,17	117:7	91:5
reconcile 52:19	53:12,22	relatively	remedy 64:16
54:13 61:21	reflection	35:10	104:22
113:19	94:16	release 83:22	remember
record 20:22	reflects 50:12	83:23 86:3,4,8	29:13 61:3
21:11 29:3	51:11 99:18	86:10,13 98:13	81:21 82:20
50:20 56:6	regain 91:3	98:14,14 99:3	108:4,13
118:4	regarding	99:5 105:8,16	remove 71:6
recourse 47:4	88:10	106:9 115:12	removed 94:16
63:23 71:1,3	regina 13:3	released 82:17	removes 71:20
96:16 98:6	regulation 42:1	86:1 104:6	render 72:15
recover 26:10	regulator	105:5,23	rendered
49:12 91:3	32:14 39:13,17	releases 98:16	115:24
recovery 117:2	40:2 41:5,14	103:23 114:16	repay 91:2
rectified 95:4,7	55:19 111:10	relevant 20:17	repeat 17:16
redefined	regulators	44:18 47:12	116:15
94:18	32:21 40:4	78:16 87:14	repeatedly
redline 45:22	54:17,21 65:20	103:23 111:23	61:11
45:23 47:20	80:3	114:19 115:11	replace 30:9
67:16 68:17	reilly 8:7 13:13	116:11	replete 65:4
69:4 76:18	related 36:17	reliance 85:18	77:24
88:7,9	relationship	85:19	reply 22:17
refer 39:20	36:19 37:11	relief 107:12	53:16 67:13
42:8 73:16	39:6 40:7,19	relieved 78:24	71:22 81:19
reference	41:3,15 48:19	relieves 37:3	115:10
34:14 49:17	48:19 50:13	rely 63:8	report 17:11
55:2,16 90:1	51:19 52:6,7	remain 69:1	25:13 64:15,18
	55:10,15 56:2		100:5,10 101:8

reporting 110:25	responsible 107:7	93:17 97:10 99:1 109:21 111:5 112:15 114:13 115:1 115:15 116:17	running 95:4 runs 109:21 ryan 4:7 8:10 8:11,12 10:4 11:12
represented 62:16	rest 25:3 58:6 72:16	rights 26:15 36:20 40:20 44:8 56:17,19 56:22 60:10,24 60:25 61:13,15 66:22 77:22 81:4 90:20 91:4,6,7,10,15 91:16,17	s
require 78:23 required 44:23 49:8 81:14 110:4	result 68:22 78:6 82:16 90:15 92:7	road 118:21 rob 10:5 robert 4:14 9:16 13:5 15:2 robin 11:25 robinson 8:9 robison 13:15 rodriguez 13:16 roni 41:12 42:9 55:1 79:6 room 86:2 ross 4:11 7:7 routinely 92:20 rudolph 13:17 rule 78:4 116:4 ruled 82:6 ruling 25:10 82:15 rump 55:11 110:18,22 run 75:24	sabin 13:19 sale 31:11,12 31:16,17 sam 3:22 5:4 20:13 21:11 82:4 sameer 9:12 samuel 6:21 sanchez 8:13 sarah 7:13 14:20 satisfied 85:2 satisfy 32:14 94:24 saw 60:4 81:15 102:7 106:23 saying 25:24 35:13 53:20 61:9 62:15 70:25 72:11 76:13 95:11 99:3 100:17 103:1,13 108:2 108:21,23 109:25 110:6 110:17 111:2 116:17,21
requires 114:17 117:7	resulting 36:17 retail 32:18 51:24		
reserve 20:19 residual 85:8,9 resolution 2:3 resolve 20:1 23:8,9 113:12 resolved 18:1 29:1,6,7 respect 29:24 47:4 55:10 71:2 79:13 83:24 84:14 87:21 96:16 100:9 107:1 110:13 respectfully 96:25 respectively 34:19 respond 22:20 33:14 34:12 responding 55:1 response 100:1 115:9,11 responses 33:13 111:1	return 72:20 reveal 51:18 review 100:7 rewrite 77:19 rhodely 4:22 8:23 richard 8:4 13:15 richards 13:14 rick 5:13 rickie 10:2 ricoh 26:21 riffkin 8:8 right 16:2 19:11,20 20:5 22:4 24:7,23 26:2 27:21 32:2 34:1 38:2 38:25 46:13,20 47:1,9 57:3 60:15 65:17 67:12 69:11 70:22 73:24 76:12 80:20 82:21 86:12 87:15 88:4,25 90:6 92:5,12		

[says - services]

Page 32

says 34:20 35:22 37:2,16 37:17,25 38:6 40:9 41:8 42:22 43:6 46:6 47:16,17 50:8 55:2,5,23 59:25,25 60:17 60:20,22,23,23 61:7,15 66:21 68:3,6 69:9,12 71:1,2,4,13,22 72:18,20 76:6 78:5,21 79:1 79:14 81:2 87:23 88:11 89:10 91:24,25 92:1 95:9,21 95:23 96:7,8 96:14 97:4,7 98:8 99:4 101:10 104:18 105:1 109:18 112:1,9,23 scam 16:21 scenario 90:20 90:21 schedule 99:18 schedules 75:23 99:16,16 108:2,12,14,17 scheuer 13:20 schickler 13:21 schneider 8:14 schottenstein 8:15	schroeder 8:16 schwarz 13:22 scott 6:7 10:12 11:6 scratching 60:1 screen 34:7 53:9 scrivener's 68:10,17 94:21 103:7 searched 81:21 seated 16:2 sec 53:12,21 54:11 second 39:22 45:7,16 52:11 57:6 59:5 87:10 90:22 92:18 94:10 98:8 103:4 104:14 109:18 112:22 114:16 secondarily 38:19 section 24:3,7 24:14,15,18,21 25:4,14 26:9 26:13,14 37:15 46:16,21 59:19 59:19 60:5,7,8 60:13 61:11,12 66:1,2,5 68:16 68:16 70:8 72:18,19,24 77:17,21 78:9 78:17,17,17,17	78:17,18 91:15 91:15 92:3,4,9 92:14,16,18,24 95:15 96:10,13 100:7,7 102:23 103:3 104:5 105:11 112:18 112:22 sections 77:17 secured 35:5 61:18 see 18:6 21:16 32:20 33:5,8 35:17 36:7 39:7,8,10,12 39:16 41:19 43:20 47:19 53:2 54:25 55:20 62:7,12 62:12 75:12,23 79:14 81:22,25 83:23 86:3 88:16 96:4 98:17,20,21 109:8,19 115:9 seeing 29:13 seeking 23:8 seeks 82:15 seem 17:13 seems 25:12 45:10 85:17 seen 29:15 33:4 53:1 63:7 70:17 99:4 111:19 117:3 seizes 98:13	selectively 89:22 selendy 8:17 send 51:12 senes 13:23 senese 13:24 sense 63:13 69:19 71:5 88:4 92:9 93:4 93:21,22,23 94:5,7 95:9 101:23 102:11 105:2 113:13 113:18 sentence 25:1 68:13 70:25 72:15 88:15,24 89:6 90:22 112:22 sentences 25:4 separate 26:24 30:23 48:19 separateness 80:18 series 3:11 16:6 19:17 20:24 21:7 22:13 30:9 34:14 35:6 51:7 53:5 65:18 82:15 87:12 95:12 serious 16:13 17:16 95:1 served 60:4 services 30:22 44:5 87:1
---	---	--	--

<p>89:15 serving 108:24 set 18:17 30:25 35:23 77:10 85:20 setoff 47:4 96:16 setovich 13:25 settled 104:19 settlement 98:5 several 34:2 49:11 severally 43:10 shara 5:5 6:1 share 31:24 34:7 shareholder 47:7 70:14 96:19 shareholders 70:19 shares 80:8 shawn 8:2 sheet 46:5 53:11 56:4 shell 67:4 shifted 33:4 shoba 8:5 short 35:11 51:14 show 34:23,24 68:25 87:5 showing 88:25 97:18 107:14 shown 110:1 shows 45:23 52:23 69:1</p>	<p>86:12 116:12 shred 43:4 siddharth 7:25 side 22:14,14 33:1 34:24 47:10 sign 37:25 86:3 86:3 signature 36:8 118:6 signed 34:18 35:18 36:13 65:12,23 significant 16:8 27:20 silo 23:3 29:12 62:7 simon 6:9 simply 59:12 102:4,25 single 49:14 54:6 singular 88:19 sitting 18:7 31:6 situated 84:3 situation 106:8 size 28:24 52:12 slate 77:19 slide 33:24 34:13,23,23 39:20,24,25 43:21 53:2 58:10 59:4,5,8 60:2,3,3,3 106:19</p>	<p>small 43:24 95:15 smith 13:18 14:1,2 software 16:16 sold 31:13 70:3 solowiejczyk 14:3 solutions 118:20 solvent 85:1 soma 9:20 somebody 36:23 37:6 39:15 55:1 76:6 106:10 107:2 sonya 2:25 118:3,8 soon 17:17 sophisticated 63:7 sorry 21:4 34:23 46:3 54:22 67:12 69:3 80:19 82:11 97:2 114:2 sort 18:12 72:23 87:11 89:22 101:20 sorts 74:8 sought 29:18 99:14 southern 1:2 86:7</p>	<p>space 27:18 speak 20:8 29:22 85:12 speaks 38:7,8 special 25:6 78:4 specific 59:22 59:24 88:25 89:1 90:18,19 114:17 specifically 57:17 75:16 76:13 91:24 112:1 spiral 69:4 sprofera 14:4 st 8:18 stabbert 14:5 stable 60:8 stage 100:23 stanbury 14:6 standalone 54:9 standard 94:24 standing 108:21 116:17 stands 87:20 stapleton 14:7 start 18:5 22:13 62:6 64:5,6,9,24 65:6,7 68:24 88:7 90:21 started 54:3,3 64:9 79:25 starting 22:23 23:21 68:5</p>
---	--	--	--

[starts - talking]

Page 34

starts 24:14 35:12 45:23 47:18 55:21 66:16 67:13 state 63:15 statement 32:16 43:5,5 53:11,16,20,22 86:9 116:8 statements 54:9 75:23 87:15 states 1:1,12 stating 101:5 status 84:20 stayed 87:6 steadman 14:8 steffan 10:16 step 28:18 67:9 steps 44:23 55:21,25 steven 13:1 stipulated 48:6 111:8 stock 80:15 stole 88:13 stood 63:11 85:15 stop 38:23 89:18 stout 14:9 stratton 15:4 strongly 25:13 106:20 struck 70:15 structure 27:5 32:4 50:20	51:16 58:24 59:10 69:17 72:4 117:4 structured 29:11 32:8 stuck 96:1 study 108:19 stuff 115:3 style 99:6 sub 60:15 subject 31:18 35:23 105:15 submission 117:18 submit 29:2 99:10 submitted 53:11,20 54:11 99:17 108:23 subsequent 104:20,21 109:9 subsidiaries 29:20 80:9,20 subsidiary 80:13,16 substantially 23:25 substantive 64:16 substitute 94:5 104:21 sucked 30:19 sue 104:23 sued 26:12 suggest 16:18 29:17 32:7	49:15 57:6 61:23 68:22 75:1 76:22 78:13 90:3 suggested 107:2 suggesting 23:17 28:5,17 29:5 31:23,24 suggestion 32:7 107:16 111:24 suggests 74:2 75:12 76:19 77:22 79:20 106:20 suite 118:22 sullivan 14:10 sumit 10:23 summarizing 101:4 supersede 104:21 supersedes 37:12 115:13 superseding 104:23 105:9 105:17 supplemental 99:10 support 116:6 supportive 61:24 supposed 72:3 87:3 103:9 sure 17:4,14 18:6 21:16	27:17 28:7,15 31:8,15 33:1 34:7,16 41:22 44:3 63:18 69:2,6 70:23 76:1 90:16 93:13 94:15 95:23 101:9 108:24 111:6 116:18 suri 8:19 surprising 29:9 29:10,10 57:6 swoop 49:14 systems 86:7 t t 7:17 118:1,1 ta 14:11 tab 46:2,3 taji 14:12 tak 14:23 take 16:16 20:9 28:18 37:22 57:8,19,20 63:3,13 75:4 82:15 102:22 117:18 taken 17:10 55:14,25 56:7 takes 63:1 talk 49:18 85:13 87:2 88:6 104:17 talked 50:10 110:11 talking 25:21 51:15
---	---	--	---

[talks - time]

talks 104:7	65:4 66:1,3,22	98:8,12 99:2	95:22 98:5,10
tanzila 4:12	67:8 68:4,7,22	99:12 110:5	100:18 101:19
9:10 14:25	71:8 72:16	things 74:8	101:20 102:4
target 31:3	73:5 77:24	100:6 108:3	102:10,18
tautology 59:1	79:23 80:2,25	think 19:20	103:5,12
taxes 16:17,19	81:10 83:9,13	20:18 22:12	105:25 106:1,5
taylor 8:20	84:7,10 85:12	23:22 24:12	106:16,16
taylor.kamara	85:16,19 86:16	25:9 26:23	107:22 108:4
4:18	88:5,11,20,21	27:16,20 30:10	110:16 111:15
team 102:4	88:24 89:4,7	31:4 32:6	115:10,16
technically	90:10 93:18,24	34:25 37:22	116:12
88:9	94:2 95:10,21	41:4,10 42:15	third 30:23
telephonically	96:7,11 97:7	46:15,18,20	44:4 66:23
5:7	98:9,10 104:6	48:6 49:24	67:21 93:4,6
tell 43:10 49:22	109:17 110:15	51:4 52:14,16	98:12
50:3,4 69:5	110:23 111:9	53:15 54:1,2	thirty 19:21,22
74:21 98:20	terrific 100:19	55:13,16 56:5	66:13
telling 40:4	testify 49:6	56:13 57:5,13	thomas 6:5
41:13	texas 67:9	58:2,12,14	8:18 10:22
ten 18:22,24	thank 17:8,19	59:16 60:6	thomashower
terence 4:15	17:23 20:8	62:17 63:9,19	14:13
7:16	21:2,10 22:10	63:24 66:1	thorough
term 68:7 89:3	63:25 64:2	68:15,16,20,21	100:6
89:5 94:1	66:11 97:22	69:25 70:24	thought 77:2
95:20 96:5	98:1 101:15,16	73:12,13 74:1	89:21 111:23
97:4,6 112:25	101:17 106:14	74:24 75:16,17	114:4
terms 23:9,10	117:13,15,17	76:5,8,18	three 19:22
23:20 24:4	thanks 46:12	77:10,11,18	24:7 55:4,6
25:3,21,22	theory 38:16	78:8,8,9,11,14	60:14,15 67:20
26:9 28:11	thereof 104:23	78:15,19 80:24	77:11,11 79:9
30:2 35:22	therese 13:20	82:21 83:9	103:16
40:17 41:13,15	thing 27:17	84:5,19 86:11	thunder 88:13
45:14 48:3,8	29:9,10,10	86:24 87:11	tie 78:8
48:21,25 49:4	36:23 37:5	88:5 90:10	tim 7:1
53:18 54:4	38:14 39:21	92:13 93:2,2	time 21:15
57:4,9 58:12	87:2 88:15,16	93:14 94:25,25	29:25 30:16
63:24 64:11	93:16,16 97:15	95:1,8,11,22	48:24 49:17

[time - under]

Page 36

50:23 52:24 53:23 56:1 63:15 64:18,21 66:23 69:19,20 69:20 73:20,24 75:17 92:22 115:6 117:14 117:15 times 70:17 timon 12:24 timothy 13:13 title 100:7 today 16:6 52:19 58:23 64:11,21 77:18 98:17 today's 18:2 todd 11:8 told 45:23 46:7 51:20,21 56:14 56:17,23,24,25 79:17 111:22 tomas 12:5 ton 54:8 tonight 116:19 tony 8:25 took 30:2 40:23 44:23 57:8 91:12 100:6 top 55:1 66:6 69:3,17 74:6 80:7,8 99:1 tort 28:16 totally 80:20 92:17	tou 44:5 tough 25:9 tran 14:14 transaction 113:20 transcribed 2:25 transcript 99:20 118:4 transfer 35:16 36:1,16,19,23 37:5 44:7 50:23,24 51:12 56:21 64:20 66:22,25 67:3 67:14 79:2 81:9 89:11 111:17 112:6 112:25 113:2,8 transferee 35:24 36:2 transferor 35:25 36:1 65:25 transferor's 36:20 transferred 36:2,5 38:9 40:20 50:25 55:12 82:7 89:15 105:2,4 113:1,3 transferring 34:21 transfers 81:2 tried 62:15 102:9 108:25	tristan 6:6 true 29:25 30:1 31:8 82:14 83:6 85:4 118:4 trust 60:11 61:18,18,19 trustee 16:24 try 18:12 28:7 33:14 40:14 102:15 116:20 trying 16:23 17:13 28:19 92:24 94:4 102:17 turetsky 4:25 8:21 turn 52:9 64:7 67:16 70:7 92:9 104:4 116:2 turned 111:11 turner 14:15 turning 17:24 54:16 tweed 3:10 tweet 116:18 twitter 27:17 two 25:4 27:19 28:20 66:13 67:9 70:25 75:19 89:8 90:17 104:17 106:25 109:14 109:17 113:9 tyler 12:1,10	u u.k. 32:14,17 32:18,21 39:5 39:13 40:2 41:5,13 54:21 55:9,19 110:7 111:10 u.s. 1:23 16:24 17:11,12,22 74:19 84:24 uab 40:7 88:25 ubierna 8:22 uday 11:13 uk 32:15 ultimately 80:10 unable 91:2 unambiguous 76:4 unambiguou... 85:16 111:11 unaware 36:13 unchanged 23:25 uncontroverted 32:13 under 22:23,24 23:10 25:3,18 25:21,22,22 28:11 30:17 32:4 44:5,17 48:2,7,21,24 55:23 59:2 60:19 61:1,16 66:23 77:22 83:19 91:4,15 91:25 92:4
--	--	---	---

[under - walk]

Page 37

98:21 100:22	unsigned 33:18	108:8,10	66:5,8,10 73:5
101:2 105:11	65:13	user's 36:17	73:7,7 81:1
106:11 107:8	unusual 57:7	users 55:8,10	82:22,25 83:6
109:12,12	update 16:8	56:1,1,4 79:11	83:13,21,25
117:18	use 23:10,10,20	79:13 112:24	84:2,4,10,14
understand	24:4 25:3,21	using 2:1 89:2	84:20,23 86:18
20:6 24:25	25:23 26:9	89:5 101:8	86:19,20,21
27:25 28:14	28:11 30:2	usually 62:12	87:22 88:2
33:7 36:25	36:17 40:17	63:17 64:22	102:22 104:7
37:13 38:2	41:13,16 45:14	utsav 11:10	109:12
41:17,23 45:5	48:3,8,21,25	v	versions 23:25
61:10 73:12	49:4 53:18	v 8:7 13:12	42:21 44:17,19
83:1 89:16	54:4 57:9	vallon 4:22	73:4 83:1,19
94:10 95:12	58:13 61:3	8:23	88:2 94:2
96:22 103:11	63:24 64:11	value 27:9,9	105:11,12,15
116:15	65:4 66:1,3	30:18,23 31:5	109:12 113:23
understanding	67:8 68:4,7,22	80:20 84:22	versus 86:22
24:2	71:8 72:17	85:8	vessies 14:16
understood	73:5 77:24	various 58:9	vicariously
39:13 49:3	79:24 80:2,25	65:8	70:20
72:11,16	81:11 83:10,13	vaunted 99:13	victor 8:22
107:20	84:10 85:13,16	vazquez 8:24	view 49:7 50:6
undertake	85:19 86:16	vejseli 8:25	107:19
23:15	88:6,7,11,20	veritext 118:20	vince 14:10
unequivocal	88:21,24 89:4	version 23:21	vincent 7:10
86:9	89:7 90:10	23:23,23,24	violate 40:24
unexpressed	93:18,24 94:2	24:4 30:2,2,4,6	58:20
20:17	94:9,10 95:10	30:13,14,17	virtue 91:8
unintended	95:21 96:5,7	32:11,12,13	voluminous
76:10	96:12 97:7	36:13 38:4,24	46:8
united 1:1,12	98:9,10 102:15	40:23 42:23,23	voluntarily
unjustified	104:7 109:18	43:6,13,14	63:13
82:16	110:15,23	45:3,4,19,20	w
unlimited	111:9	45:24 47:11,11	w 14:5
111:11	used 16:16	47:15 48:11	wait 36:6
unsecured 3:18	17:10 58:9	49:7,7 56:24	walk 101:10
21:12 82:4	63:22 69:9	57:1,1 62:24	

[walker - york]

Page 38

walker 4:13 9:1 wallets 87:7 want 16:12 17:1 20:15 25:8 31:16 32:15,17 39:16 39:21 41:6,22 41:24,24 46:7 47:13 54:14 63:17 84:18 85:12,13,19 87:10 89:20 93:5,5 99:12 100:3 108:7,19 111:15 116:7 wanted 17:2,3 28:1,14 68:12 72:7 89:1 101:7 wants 58:11 70:18 95:2 97:11 wark 14:17 warren 9:2 way 18:5 27:21 28:12 29:11 30:25 32:8 43:6 49:6 56:11 57:3 59:1,24 61:21 73:19 78:25 80:22,23 85:25 92:16,17,18 93:8 95:19 102:9,10 113:11,19	115:21 ways 99:15 102:10,18 we've 16:23 20:15 22:6 28:12 34:6 50:10 55:14 65:2 102:3 108:23 115:16 116:19 wedoff 9:3 week 100:5 weekend 72:8 72:9 weight 20:18 37:14 went 24:20 49:7 westover 4:20 9:4 whichever 94:20 white 3:17 21:11 62:16 82:4 william 8:16 willis 14:18 wiseman 14:19 wish 113:4 withdrawal 55:5 79:8 withdrawals 20:7 witness 18:3 43:5 witnesses 61:25 62:1	wofford 9:5 word 24:3,5,8 24:21,23,23 30:3,6 37:14 40:23 44:24,25 57:12,16,16 58:16 59:13 69:13 70:13,14 70:16 71:6 72:24 73:5 87:24,25 89:25 94:10,13,14 96:1 115:24 words 24:15,16 50:19 58:4,8 58:22 67:22 71:21 72:3 80:3 81:5,7,8 83:1 89:22 90:21 92:24 105:5 115:17 115:19 works 18:5 world 44:15 50:14 56:23 worth 34:25 99:21 worthless 80:15 would've 93:8 writing 36:4 108:22 written 33:3 42:1 71:17 76:5 83:17 92:17 110:14	wrong 104:9 wrote 111:10 wynn 14:20 x x 1:4,10 15:5 y yanez 4:20 9:4 yarborough 14:21 yards 3:12 yaz 9:6 yeah 30:18 38:17 39:23 43:21 45:15 46:20 60:15 70:9,15 73:9 83:12 84:5 87:8 88:3 89:15 106:4 114:1 115:4 year 116:9,9,10 yeary 14:22 yeilding 9:7 yep 112:19 yere 62:12 yesterday 33:24 yeung 14:23 yohannes 5:10 yoon 9:8 york 1:2,14 3:6 3:13,20 81:13 86:5,7 87:19 98:15,22 104:8 106:11 116:22
--	--	---	--

[zaharis - zoom]

Page 39

z
zaharis 14:24
zaryn 10:20
zats 9:9
zomo 4:12 9:10
14:25
zoom 2:1 34:8